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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SOVEREIGN NEWS COMPANY,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, pursuant to the principles announced in Franks v. Delaware, 438 U.S. 154 (1978) and Lo-Ji Sales, Inc. v. New York, 442 U.S. 379 (1979), a warrant containing a magistrate's knowing misstatement of material fact is invalid under the Fourth Amendment?

II. Whether in issuing a warrant for the seizure of materials on the basis of a general representation in an affidavit that a group of films and magazines contained explicit sexual acts, together with a cursory viewing of some of the magazines and "spot-check" of some of the films, the magistrate performed his constitutional duty to focus searchingly on the question of obscenity as required by Marcus v. Search Warrants, 367 U.S. 717 (1961)?

QUESTIONS PRESENTED FOR REVIEW (CONT.)

III. Whether a warrant issued on the basis of an affidavit insufficient to establish probable cause and containing information unlawfully obtained by the government was issued in contravention of established Fourth Amendment principles?

IV. Whether a court can allow the government's use of certain materials seized pursuant to an overbroad warrant by redacting the overbroad language after the search has been conducted?

V. Whether a generic description of business documents is sufficient to satisfy the particularity requirement of the Fourth Amendment?

VI. Whether the bad faith, general search of petitioner's premises requires the return of all documents, including any copies of documents, seized in the course of the search?

PARTIES

There are no parties other than those listed in the caption of the case in this Court. Sovereign News Company has no parent companies or affiliates nor does it have any subsidiaries which are not wholly owned.

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In The
Supreme Court of the United States
October Term, 1982

No. _____

SOVEREIGN NEWS COMPANY,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Sovereign News Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at 690 F. 2d at 569, and is set

forth in the separately bound Appendix at A-3. The unreported opinion of the United States District Court for the Northern District of Ohio is set forth in the Appendix at A-42.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were filed on October 6, 1982. The Court of Appeals denied petitioner's application for rehearing on November 3, 1982 and denied respondent's application for rehearing on January 11, 1983. This petition seeks review of the judgment of a United States Court of Appeals in a criminal case. This Court has jurisdiction to grant this petition under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States is set forth in the Appendix at A-182. The Fourth

Amendment to the Constitution of the United States is set forth in the Appendix at A-183.

STATEMENT OF THE CASE

This petition seeks review of the judgment entered by the United States Court of Appeals for the Sixth Circuit which affirmed the order of the United States District Court for the Northern District of Ohio finding that the searches and seizures of petitioner's premises were lawful and denied petitioner's motion for return of the materials seized.

On March 19, 1975, and again on March 26, 1975, more than twenty federal agents, acting under color of search warrants, rummaged through petitioner's entire three-floor premises for more than ten hours. They trucked away three copies of thirty-four different films and more than two thousand pages of business documents. They also hand-copied dozens of

other documents and took photographs of anything they thought relevant.

Following the searches, petitioner filed two complaints in the United States District Court for the Northern District of Ohio, seeking return of the materials seized. (App. at A-74, A-83). Petitioner's complaints were grounded upon numerous violations of the Fourth Amendment that had occurred in the conduct of the March 19th and 26th searches. The events of these two searches are set forth below.

The first search occurred on March 19, 1975, under color of a search warrant issued the preceding day by a federal magistrate (App. at A-92). The affidavit in support of this search warrant recited the facts surrounding the interception of three cartons of magazines and 8mm films allegedly shipped from petitioner's premises to Fort Worth, Texas (App. at A-102). The titles of forty-nine magazines

and ten films were listed, and the affiant described the materials as explicitly depicting ultimate sexual acts (App. at A-108 - A-109). The affidavit contained no other information concerning the materials' contents. But according to the search warrant signed by U.S. Magistrate Maher, he had been "presented with and did examine copies of the magazines and motion picture films" which had been intercepted and whose seizure was authorized (App. at A-93).

However, at trial, the magistrate admitted that he had not in fact examined all the magazines and films whose seizure was authorized. He had looked at only a few of the magazines; they were stacked in neat piles in cardboard containers, and he had checked the contents of the top magazine in each pile. He had viewed only three to five of the films and could recall the titles of but two films he viewed. Each of the remaining five to

seven films was "spot-checked" as follows: one of the persons who was applying for the warrant held a small portion of the 8mm wide, two hundred foot long, celluloid strip up to a light, and the magistrate looked at this miniscule sample.

On the basis of the sampling of the sought materials and the summary description of their contents in the affidavit, plus the information in the affidavit indicating that they had been transported via U.S. mail or in interstate commerce, the magistrate issued a search warrant which authorized a search of petitioner's premises and seizure of three copies of each of ten films and forty-nine magazines as well as various business records reflecting interstate or postal shipments of these films and magazines (App. at A-93 - A-94). Armed with this warrant, twenty-two federal agents, organized into six teams, descended on petitioner's premises

on March 19, 1975, and conducted a massive five-hour search.

During this first search, the agents physically seized three copies of forty-four of the forty-nine magazines listed on the warrant, and all of the ten films. In addition, they made notes of the titles and location of sixty-nine films and thirteen magazines not listed on the warrant. More than one hundred business records were physically seized, and the agents hand-copied or made notes about dozens of other records which were not seized and did not reflect the shipment of any film or magazine listed in the warrant. One FBI agent roamed the premises and took pictures during most of the day.

The following day, government officials began preparations to obtain a second search warrant to search petitioner's premises once again. Five days later, on March 25, 1975, they presented a

new affidavit to Magistrate Maher, seeking a second warrant. This affidavit comprised the only sworn testimony presented to the magistrate in connection with the second warrant.

The affidavit consisted primarily of a statement of the results of the previous search. No magazine was presented to the magistrate, nor was the content of any of the magazines or films whose seizure was sought described to him, primarily because none of the agents had viewed the contents of any of them. The magistrate was simply informed of the titles of these magazines and films, and that, as a group, their covers "vividly depicted obscene sexual activities between males and females, males and males, females and females, including acts of fellatio, cunnillingus [sic] and ejaculation, of the same kind which were seized pursuant to the [search warrant of March 18, 1975]"(App. at A-165).

On the basis of the information in this affidavit, the Magistrate authorized seizure of sixty-nine films and thirteen magazines, plus any other obscene, lewd, lascivious and filthy magazines and motion pictures (App. at A-149). In addition, the warrant authorized seizure of "documents reflecting the corporate structure of Sovereign News Company and any of its affiliate companies." Ibid. The term, affiliate, was nowhere defined nor limited in the warrant, nor was the term used anywhere in the affidavit.

The following day, a second search of petitioner's premises ensued.

Twenty-two FBI agents, two postal inspectors and one customs agent arrived at the premises of Sovereign News Company at about 10:15 a.m. with the second search warrant. The agents again thoroughly searched the entire building, this time searching through the business's books and records even more intensely than during

the earlier search. This second search lasted about five and a half hours. The physical seizures alone during this second search consisted of three copies of seven magazines and twenty-four films and more than two thousand pages of business documents.

The trial on petitioner's complaints seeking return of the seized materials lasted two weeks during which time the district court was presented with the above-described evidence. On October 15, 1975, the district court denied petitioner's motions and refused to order return of any of the materials except for a few pages of documents.

Petitioner promptly appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit. However, during the pendency of the appeal, an indictment based on the seized materials was returned against petitioner and others. Accordingly, the

Sixth Circuit dismissed Sovereign News Company's appeal without prejudice on the ground that the district court's judgment was no longer a final appealable order. Sovereign News Co. v. United States, 544 F. 2d 909 (6th Cir. 1976), cert. denied, 434 U.S. 817 (1977).

On June 19, 1978, Sovereign News Company and others went to trial on the multi-count indictment which had been returned in March, 1976. On July 24, 1978, a jury acquitted Sovereign News and all other defendants in that case on all charges.

Petitioner then filed a motion in the Court of Appeals seeking reinstatement of its appeal on denial of its motions for return of property. The Court of Appeals overruled Sovereign News' motion without prejudice to petitioner's right to renew its motion in the district court and to perfect an appeal in the event that the

district court denied said motion. (App. at A-46).

On October 11, 1978, Sovereign News filed a renewed motion for return of property in the district court. By the time the hearing was held on the renewed motion, the government had returned the originals of the films, magazines and business records, but had retained copies of the seized business documents and had distributed other copies to a number of other law enforcement agencies. Petitioner, by its renewed motion for return of property, sought the return of all copies made of materials seized in March, 1975.

The district court overruled Sovereign News' renewed motion. (App. at A-42).

Petitioner once again appealed to the Court of Appeals for the Sixth Circuit. The Court of Appeals found "no constitutional error in either the issuance or

execution of either warrant," 690 F. 2d at 577 (App. at A-33); and therefore, made the return of the copies of the material contingent upon the government's failure to show that retention of said materials was necessary for a specific investigation. Id. at 578; App. at A-37. It is from this determination that petitioner seeks review.

REASONS FOR GRANTING THE WRIT

I. THE FINDING OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT THE MAGISTRATE'S MISSTATEMENT OF MATERIAL FACT WAS A TECHNICAL ERROR THAT DID NOT AFFECT THE VALIDITY OF THE WARRANT PRESENTS A QUESTION OF FIRST IMPRESSION TO THIS COURT THAT HAS BEEN DECIDED BY THE COURT BELOW IN A MANNER IN DIRECT CONFLICT WITH THE PRINCIPLES ANNOUNCED IN FRANKS V. DELAWARE, 438 U.S. 154 (1978) AND LO-JI SALES, INC. V. NEW YORK, 442 U.S. 379 (1979).

On March 18, 1975, United States Magistrate Herbert T. Maher signed the first of two search warrants at issue

here. He stated in this warrant that four days earlier, he had been "presented with and did examine copies of the magazines and motion picture films" whose seizure was being authorized by him. However, at the trial below, he admitted that he had not actually examined most of the forty-nine magazines whose seizure he authorized. Rather, he had looked only at the magazines which happened to be on the tops of the several piles of magazines presented to him. He viewed only three to five of the films and could recall the names of but two of them. And he had merely made a token "spot-check" of the other films. A small portion of each was held up to the light for him. Since the films were only eight millimeters (one-third inch) wide, discovery of their contents with the naked eye would be extremely difficult, and only a small portion of each film's two hundred foot length was even checked in this manner.

Although well aware that he had not even looked at most of the magazines, and had glanced at many of the films in, at best, a perfunctory manner, Magistrate Maher nevertheless knowingly stated that he had "examined" copies of the magazines and films whose seizure he authorized. This misrepresentation cannot be characterized as the type of innocent, negligent or reckless error produced by drafting "by non-lawyers in the midst and haste of a criminal investigation." United States v. Ventresca, 380 U.S. 102, 108 (1965).

Nevertheless, the Court of Appeals found that the warrant was not invalidated under Franks v. Delaware, 438 U.S. 154 (1978) because Franks was narrowly directed at deception of the magistrate by the affiant and therefore did not control the instant case. 690 F. 2d at 572; App. at A-13. The Sixth Circuit further held that the magistrate's misstatement was

simply a technical error that was insufficient to compromise the neutral and detached status of the magistrate as in Lo-Ji Sales, Inc. v. New York, 442 U.S. 379 (1979). 690 F. 2d at 573; App. at A-15.

Indeed, the question here presented is a novel question that has never been directly addressed by this Court. However, in determining that the misrepresentation did not affect the validity of the warrant, the Court of Appeals adopted an unnecessarily limited reading of Franks and Lo-Ji to arrive at a result in conflict with the underlying principles of these two opinions - namely that the Fourth Amendment cannot tolerate the issuance of a warrant that contains intentionally falsified information or that has been authorized by a judicial officer who is not both neutral and detached. Although Franks did concern an intentional misrepresentation by the

affiant, this Court made it clear that it was the potential mischief wrought by "the specter of intentional falsification," id., at 168, that compelled its conclusion that a defendant must be given an opportunity to challenge a warrant's veracity. The rule should be no different when the perpetrator of the falsehood is the magistrate himself - the guardian of unreasonable government intrusion as opposed to the law enforcement authorities whom the magistrate is to control.

In the present case, of course, it was the magistrate himself--the official whose constitutional role is to protect the privacy of citizens unless and until the government persuades him that it has good and sufficient cause to invade that privacy, Nathanson v. United States, 290 U.S. 41 (1933)--who perpetrated a fraud. Magistrate Maher intentionally misrepresented that he had examined all the materials authorized to be seized and had,

therefore, performed his constitutional duty "to focus searchingly on the question of obscenity," Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 637 (1968), when, in fact, he had done nothing of the kind.

Thus, the warrant was cloaked with the "specter of intentional falsification" ruled fatal in Franks, and the integrity of the magistrate's role as a neutral and detached judicial officer was irreparably eroded so as to reduce the magistrate to an actual participant in the wrongdoing just as in Lo-Ji. The judicial process has been sullied by the magistrate's false statement. It is of utmost importance that this Court address this question of first impression and clarify the full scope and meaning of its decisions in Franks and Lo-Ji, so that further misinterpretation by the courts below will be averted.

II. THE DETERMINATION OF THE COURT OF APPEALS THAT PROBABLE CAUSE EXISTED FOR

THE ISSUANCE OF A WARRANT ON THE BASIS OF A GENERAL REPRESENTATION IN AN AFFIDAVIT THAT A GROUP OF FILMS AND MAGAZINES CONTAINED EXPLICIT SEXUAL ACTS, TOGETHER WITH A MAGISTRATE'S CURSORY VIEWING OF SOME OF THE MAGAZINES AND "SPOT-CHECK" OF SOME OF THE FILMS, IS NOT CONSISTENT WITH THE DECISIONS OF THIS COURT THAT IN ISSUING A WARRANT FOR THE SEIZURE OF BOOKS, MAGAZINES OR FILMS, A MAGISTRATE MUST FOCUS SEARCHINGLY ON THE QUESTION OF OBSCENITY.

This Court has repeatedly held that in the issuance of a warrant for the seizure of books, magazines or films, a magistrate may not rely upon conclusory assertions of obscenity by law enforcement officers but must focus searchingly on the question of obscenity. Marcus v. Search Warrants, 367 U.S. 717 (1961); Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968); Roaden v. Kentucky, 413 U.S. 496 (1973); Heller v. New York, 413 U.S. 483 (1973).

However, in the present case the Court of Appeals, acting contrary to this Court's directive, upheld a search warrant issued by a magistrate supplied with neither sufficient information to assess whether the materials were obscene or not, nor with personal knowledge gleaned from a meaningful examination of the materials to make any such assessment. Rather, the affidavit in support of the first warrant lumped together all the films and magazines and represented that they contained explicit depictions of ultimate sexual acts. The magistrate had no information to evaluate the materials in the context of the guidelines established by this Court in Miller v. California, 413 U.S. 15, 24 (1973).

Nor were the deficiencies of the affidavit remedied by the magistrate's personal viewing of some of the materials. He looked at only a few of the magazines and viewed only three to

five films. The "spot-check" of the remainder of the films was meaningless because it was impossible to discern with the naked eye what was occurring in a negative which was one-third of an inch wide.[1] Furthermore, only a small portion of the two-hundred foot length of each film, as chosen by the prosecution, not the magistrate, was viewed at all. The consideration afforded the question of the obscenity of the films and magazines by the magistrate fell far short of the constitutionally required searching

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[1] In Walter v. United States, 447 U.S. 649 (1980), this Court acknowledged the futility of this procedure, stating:

> "Each reel was eight millimeters in width. Petitioner Walter informs us that, excluding three millimeters for sprocketing and one millimeter for the border the film itself is only four millimeters wide. Brief for Petitioner in No. 79-67, n. 8. Since the screens depicted within the frame are necessarily even more minute, it is easy to understand why such films cannot be examined successfully with the naked eye. Id., at 652, n. 2 (Emphasis added).

focus. Having only incomplete descriptions and having conducted the most cursory of examinations, the magistrate issued the first warrant absent a showing of probable cause, in violation of the Fourth Amendment.

The affidavit's perfunctory description of the contents of materials claiming First Amendment protection, even when coupled with a small sampling of such materials, was constitutionally inadequate. Accordingly, petitioner requests that this Court grant its Petition for a Writ of Certiorari to review the important constitutional issue raised.

III. THE AFFIDAVIT GIVEN TO SUPPORT THE SECOND SEARCH WARRANT WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE AND CONTAINED INFORMATION UNLAWFULLY OBTAINED BY THE GOVERNMENT AND THEREFORE, THE ISSUANCE OF THE SECOND WARRANT WAS EXECUTED IN CONTRAVENTION OF THE VERY ESSENCE OF FOURTH AMENDMENT PRINCIPLES AS ANNOUNCED BY THIS COURT.

A. The Practice Of Extensive Notetaking And Copying Of Documents Not Encompassed In A Search Warrant During The Execution Of A Warrant For Other Listed Documents By Law Enforcement Authorities Has Never Been Condoned By This Court.

In advance of the search, the agents participating in the first search of Sovereign News Company's premises were given pads and pencils and were instructed to search for and write down the title and location of magazines and films, not listed in the first warrant, whose covers depicted "hard-core pornography." The agents were also instructed to search for records outside the scope of the first warrant and to take notes on the contents of those records.

Following these instructions, the agents wrote down the titles and locations of sixty-nine films and thirteen magazines not listed in the warrant. They also hand-copied the contents of dozens of

business records whose seizure was not authorized by the warrant. These notes were then incorporated to form the bulk of the affidavit in support of the second search warrant.

This Court has never condoned, either explicitly or implicitly, the practice of taking notes regarding documents beyond the scope of the warrant under which the search is proceeding, particularly where such information is to be used as the basis for probable cause in an affidavit to support a second warrant to search the same premises. Rather, the case authority suggests that the practice is violative of Fourth Amendment principles.

The Fourth Amendment applies to the seizure of intangibles, as well as tangibles. Katz v. United States, 389 U.S. 347, 353 (1967). Indeed, the court below, a number of years earlier, invalidated a search warrant issued as a result of notes taken by searching

officers during a prior search. United States v. Gray, 484 F. 2d 352 (6th Cir. 1973), cert. denied, 414 U.S. 1158 (1974). The court found that the taking of notes clearly constituted a seizure. Because the notes taken by the officer constituted the basis for issuing a second warrant, the court found the second warrant to be impermissibly tainted. Id. at 356.

The Court of Appeals' approval of the notetaking procedure in this case carries grave consequences. Under the opinion of the court below, law enforcement authorities may enter an individual's premises armed with a very narrow, well-defined warrant and in the face of such warrant, copy down descriptions and verbatim passages from an individual's private papers and use these notes in support of a second warrant. Thus, the government may accomplish indirectly what it may not do directly - viz. conduct a

general exploratory search. The Fourth Amendment cannot tolerate such a contortion of its principles.

B. Because the Affidavit in Support of the Second Warrant was Based in Large Part on Information Seized Unlawfully During the First Search, the Second Warrant and Search was Tainted with Illegality.

The affidavit signed by Agent Grotz to obtain the second warrant was based, in large part, upon the notes taken by the agents of films, magazines and business records inspected during the first search but whose seizure was not authorized by the first search warrant. Agent Grotz, in his affidavit, recited the titles of the sixty-nine films and thirteen magazines which had been noted during the first search and stated that the covers of these materials vividly depicted certain ultimate sexual acts. He also described,

and in some cases, set forth verbatim, the contents of numerous business records which had been hand-copied during the first search. On the basis of this information, the magistrate issued the second search warrant.

The taking of notes during the first search constituted an unlawful seizure. Because the second warrant was obtained on the basis of this information gained by this unlawful seizure, the second warrant and the search executed under its authority was tainted with illegality.

C. In Justifying The Note-taking Procedure Employed During The First Search On The Basis Of The Plain View Doctrine, The Court Below Ignored The Requirements That The Discovery Be Inadvertent And That The Incriminating Nature Of The Evidence Be Readily Apparent. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

This Court has ruled that law enforcement authorities need not obtain a

separate warrant for those incriminating items which are discovered in plain view. In order to fall under the plain view doctrine, three criteria must be satisfied: (1) the initial intrusion must be lawful; (2) the incriminating character of the material must be readily apparent; and (3) the discovery must be inadvertent. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

In the present case, the magazines, films and business records of which the agents took notes were not discovered inadvertently nor was it immediately apparent that these documents constituted incriminating evidence. And, as already urged, see pp. 18-22, inter alia, the initial entry onto the premises of Sovereign News was unlawful.

1. The Discovery was not Inadvertent.

The discovery of the magazines, films and business records which the agents

noted during the first search was by no means inadvertent. The agents specifically intended to search for magazines, films and records not identified in the warrant, but which they knew were on the premises and intended to effect a seizure of the information contained in the business records. In fact, they were instructed as such before the search ensued.

The Court of Appeals' characterization of the agents' well-mapped program to search for and seize this information as a "suspicion" or "hunch" ignores reality. In effect, the court below has written out the requirement of inadvertence contained in the plain view doctrine as announced by this Court in Coolidge v. New Hampshire, supra.

2. It was not Immediately Apparent that the Evidence was Incriminating.

Not only was it not readily apparent

that the films and magazines noted by the agents were incriminating evidence, but in fact the agents had no probable cause to believe they were incriminating. Only a judicial officer is qualified under the Fourth Amendment to make a judgment of obscenity. Marcus v. Search Warrants, supra; Lee Art Theatre, Inc. v. Virginia, supra; Roaden v. Kentucky, supra; Heiler v. New York, supra. Moreover, this judgment requires consideration of the work as a whole, not just its cover. See, Miller v. California, supra.

Similarly, the agents lacked probable cause to believe that the business records which they had hand-copied constituted evidence of a federal crime. This is because the business records were incriminating only if the films and magazines to which they related were obscene, a determination which, as just noted, the agents were not qualified to make.

Furthermore, even if the information contained on the film boxes, magazine covers and in the business records had been incriminating, that fact could not have been immediately apparent to the agents. It could only have been ascertained by a close inspection of the film boxes and magazine covers and a thorough reading of the business records.

The Court of Appeals seemingly overlooked this important element of the plain view doctrine in justifying the notetaking procedure. In order to preserve the plain view doctrine as announced by this Court, and thereby accommodate both the investigative efforts of law enforcement authorities and the rights of individual citizens, this Court must provide guidance regarding the individual requirements of the plain view doctrine and their continued viability.

D. The Affidavit In Support Of The Second Search Warrant Did Not

Permit The Magistrate To Focus Searchingly On The Question of Obscenity.

No probable cause existed for the issuance of the second search warrant. Indeed, the court of appeals acknowledged below: "Since the underlying affidavit, in the present case, provided only the titles and descriptions of the materials' covers, the second warrant, when viewed alone, would fail the constitutional test." 690 F. 2d at 575; App. at A-24 - A-25.

The affidavit for the second search warrant contained no information concerning the contents of the films and magazines whose seizure was sought. It simply listed their titles and stated that the covers of the magazines and the boxes in which the films were in portrayed certain sexual acts. That meager information altogether failed to establish probable cause to believe that the films

and magazines were obscene. And in the absence of probable cause to believe that the films and magazines were obscene, there was no probable cause to believe that the business records relating to the films and magazines would be evidence of a federal obscenity offense.

Nevertheless, the Court of Appeals found that because the same magistrate had acquired certain knowledge about the nature of the materials seized in the initial search, the deficiencies in the second warrant could be ignored. Id. The Court of Appeals reached this decision despite the magistrate's disclaimer of reliance upon any information other than that set forth in the affidavit.[2] This bootstrap procedure is wholly at odds with

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[2] In addition to being constitutionally inadequate, petitioner asserts that the inference of knowledge by the Court of Appeals is contrary to Rule 41(c) of the Federal Rules of Criminal Procedure.

the Fourth Amendment and with the decisions of this Court.

The facts in the instant case present a scenario similar to those in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979). In Lo-Ji, a police officer purchased two films from an adult bookstore and presented them to a magistrate for his viewing. The magistrate viewed the two films in their entirety and concluded that they were obscene. The police officer duly recited all of these facts in an affidavit offered to obtain a search warrant. The police officer also alleged in his affidavit that the bookstore had on its premises films and magazines which were similar to and portrayed sexual activities similar to those depicted in the two films which the magistrate had found to be obscene. This Court determined that those facts failed to establish probable cause to believe that any materials other than the two

films viewed by the magistrate were obscene. Specifically, this Court stated:

> This search began when the local justice and his party entered the premises. But at that time there was not sufficient probable cause to pursue a search beyond looking for additional copies of the two specified films, assuming the validity of searching even for those.

442 U.S. at 325. (Emphasis added).

The important question here is: What evidence did the magistrate have before him on which he could determine whether probable cause existed to issue a search warrant for the items sought to be seized? The answer is that he merely had a description of the titles and covers of the materials - a description that indicated absolutely nothing about the contents of any of the materials as a whole. See, Miller v. California, 413 U.S. 15, 24 (1973). No prior knowledge of the materials held on the company's premises nor any after-the-fact knowledge acquired by the magistrate could suddenly create

probable cause where none existed in the first instance. Indeed, that was the primary teaching of this Court's decision in Lo-Ji.

Accordingly, petitioner comes before this Court seeking review of the Court of Appeals for the Sixth Circuit and requests this Court to give instruction and guidance on what information is required in order to allow the magistrate to focus searchingly on the material's alleged obscenity.

IV. AN IMPORTANT QUESTION IS PRESENTED, UPON WHICH THERE IS CONFLICT AMONG FEDERAL COURTS OF APPEAL, CONCERNING WHETHER A COURT CAN ALLOW THE GOVERNMENT'S USE OF CERTAIN MATERIALS SEIZED PURSUANT TO AN OVERBROAD WARRANT BY REDACTING THE OVERBROAD LANGUAGE AFTER THE SEARCH HAS BEEN CONDUCTED.

The warrant under which the second search ensued authorized the seizure of the following:

> Obscene, lewd, lascivious and filthy magazines and motion

> picture films, included, but not limited to, the items listed in Exhibit A attached to this search warrant, and records, receipts, notations, bills of lading, journals, ledgers, billing invoices, inventories, and other documents reflecting the importation receipt and shipment of the aforementioned obscene material in interstate commerce or by the U.S. Postal Service.

App. at A-148 - A-149 (Emphasis added).

The court below acknowledged that the language contained in the warrant was overbroad, but determined that rather than invalidate the entire warrant, it would "sever and invalidate those portions containing the overbroad language and allow the items seized under the proper section to stand as evidence." 690 F. 2d at 576; App. at A-30. Thus, the court upheld a warrant which authorized a general exploratory search expressly forbidden by the Fourth Amendment and justified its conclusion by severing the offending language after the fact.

Although such a procedure has never been approved by this Court and would appear to be in complete contradiction to Fourth Amendment principles, a number of other circuit courts have indulged in this redaction process in order to permit the admission of some of the fruits of an illegal search into evidence. United States v. Espinoza, 641 F. 2d 153, 164-165 (4th Cir. 1981); United States v. Cook, 657 F. 2d 730, 734-735 (5th Cir. 1981); United States v. Christine, 687 F. 2d 749, 759 (3rd Cir. 1982); United States v. Tamura, 694 F. 2d 591, 597 (9th Cir. 1982), while the other circuits have not justified the admission of materials seized under an overbroad warrant by after-the-fact severance. See, Application of Lafayette Academy, Inc., 610 f. 2d 1 (1st Cir. 1979); United States v. Marti, 421 F. 2d 1263 (2d Cir. 1970); United States v. McSurely, 473 F. 2d 1178 (D.C. Cir. 1972).

The procedure of allowing the Government to use and retain materials seized pursuant to an admittedly overbroad warrant seriously erodes the rights the Fourth Amendment was designed to secure, the most basic of which is freedom from general warrants permitting the government to search where they please, for whatever they please. See, Coolidge v. New Hampshire, 403 U.S. 443 (1971). The particularity requirement of the Fourth Amendment stands as a constitutional protection against the unchecked abuses attendant to the use of general warrants. Boyd v. United States, 116 U.S. 616 (1886); Marcus v. Search Warrants, 367 U.S. 717 (1961); Stanford v. Texas, 379 U.S. 476 (1965); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). Yet the redaction procedure adopted by the court below, together with the Third, Fourth, Fifth and Ninth Circuits, completely sidesteps this vital constitutional

requirement. In effect, these courts have chosen to rewrite the warrant after the illegal search has already ensued in order to justify the seizure of certain materials, which was the very practice condemned by this Court in Lo-Ji Sales, Inc. v. New York, 3442 U.S. 379 (1979).

The court below gave great weight to the fact that the only magazines and films seized pursuant to the general warrant were all among those identified by title in Exhibit A attached to the warrant. From this fact, the Court of Appeals concluded that the general warrant could be upheld because it did not result in a general search and seizure. Thus, the court below did precisely what this Court has expressly prohibited - it justified the search and seizure on the basis of "what it turn[ed] up." Bumper v. North Carolina, 391 U.S. 543, 548, n. 10 (1968); Byars v. United States, 273 U.S. 28, 29 (1927); United States v. Di Re, 332 U.S.

581 (1948); Henry v. United States, 361 U.S. 98, 103 (1959).

It is clear that the lower courts are in a somewhat confused state regarding the proper remedy when a search is conducted pursuant to an overbroad warrant. The redaction procedure adopted by the court below poses a serious threat to the Fourth Amendment's protection against the abhorred general warrant. Any prophylactic effect posed by the Fourth Amendment to unreasonable searches is completely eroded by this procedure; essentially the government is permitted to trim down the warrant to constitutional size after the fact while still allowing the government to conduct a broad exploratory search during the course of which they can pick and choose the evidence they want. The increasing acceptance of this "end-justifies-the-means" procedure by the various courts of appeals calls for this Court to examine

the propriety of such a procedure within the confines of the Constitution and provide guidance regarding its use.

V. AN IMPORTANT QUESTION IS PRESENTED AS TO WHICH LOWER COURTS ARE IN CONFLICT AS TO WHETHER A GENERIC DESCRIPTION OF BUSINESS DOCUMENTS IS SUFFICIENT TO SATISFY THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT.

The court of appeals implicitly recognized that the description of business records to be seized contained in the warrant (App. at A-149) was in very general, vague language, but determined that because business records "do not enjoy the same level of First Amendment protection as non-obscene books and magazines" 690 F. 2d at 576; App. at A-32, the generic description used was sufficient to comply with the Fourth Amendment's particularity requirement.[3]

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[3] The court below has completely overlooked the fact that the business records in question were necessary to the prosecution of petitioner on the basis of (Footnote Continued)

Although generic descriptions have, at times, been deemed to be sufficient under the Fourth Amendment, such descriptions have generally been upheld when the material was contraband or stolen property - not legitimate business documentation. See, e.g., Steele v. United States No. 1, 267 U.S. 498 (1925) ("cases of whiskey"); United States v. Davis, 542 F. 2d 743 (8th Cir.), cert. denied, 429 U.S. 1004 (1975)("$5,815.25, part of which is bait money"); United States v. Scharfman, 448 F. 2d 1352 (2d Cir. 1971), cert. denied, 405 U.S. 987 (1972)("fur coats, stoles, jackets and other finished fur products, books, records and other fruits and

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First Amendment materials. Thus, these business records enjoy as delicate a position as the materials themselves. This fact strengthens the positions of the decisions in conflict with the court below when applied to the present case. See, United States v. Roche, 614 F. 2d 6 (1st Cir. 1980); United States v. Abrams, 615 F. 2d 541 (1st Cir. 1980); United States v. Crozier, 674 F. 2d 1293 (9th Cir. 1982).

instrumentalities"). When confronted with a search warrant's generic description of day-to-day business records, lower courts have ruled generic descriptions overbroad - contrary to the decision of the court below. United States v. Roche, 614 F. 2d 6 (1st Cir. 1980)("books, records, documents, consisting of but not limited to insurance applications, premium notices, claims requests for recovery, correspondence relating to applications and claims, policies, ledger sheets, invoices, account journal and office week ending progress reports which are evidence, fruits and instrumentalities of the violation of Title 18, United States Code, Section 1341"); United States v. Abrams, 615 F. 2d 541 (1st Cir. 1980)("certain business and billing and medical records of patients of Doctors Abrams, London, Braun and Abrams, London and Associates, Inc. which show actual medical services performed and fraudulent services claimed

to have been performed in a scheme to defraud the United States and to submit false medicare and medicaid claims for payments to the United States or its agents; in violation of Title 18, United States Code, Section 1001"); United States v. Crozier, 674 F. 2d 1293 (9th Cir. 1982) ("any indicia of ownership and control of the premises").[4] The court in United States v. Abrams, supra, explained:

> The use of "common sense" does not eliminate the requirement for specificity in the warrant. Using the rubric "common sense", the government would return us to the general warrant era...The warrant as drawn left it entirely up to the discretion of the officers to determine what records to seize. Since they had no guidance at all, they seized them all. This may

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[4] Each of the courts in Roche, Abrams and Crozier found that the language of the warrant was far broader than that contained in the warrant in Andresen v. Maryland, 427 U.S. 463 (1976). Petitioner asserts that the language contained in the warrant in the case at bar was similarly insufficient to control the discretion of the searching agents.

> have been prudent, but it was also unconstitutional.

Id., at 544.

When the decision of the court below is contrasted with the decisions in United States v. Roche, supra; United States v. Abrams, supra; and United States v. Crozier, supra, it becomes apparent that these courts are in conflict in their interpretation of precisely when compliance with the particularity requirements of the Fourth Amendment is achieved.

The question regarding the permissibility of generic descriptions of business documents in meeting the particularity requirements demands clarification. The inconsistent decisions of the courts below reflect the need for instruction to law enforcement authorities as to precisely what type of description of materials is necessary for compliance with the Fourth Amendment. This case

presents the opportunity for this Court to consider the demands of the particularity requirement and to resolve the conflict in the lower courts as to what the Fourth Amendment requires.

VI. FEDERAL AGENTS CONDUCTED A BAD FAITH, GENERAL SEARCH OF PETITIONER'S PREMISES.

Having intercepted several shipments of films and magazines from plaintiff Sovereign News Company, and having then obtained a narrow search warrant authorizing seizure of these films and magazines, as well as documents reflecting their interstate transportation, federal agents proceeded to use this warrant "as a ticket...to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled power of a general warrant." Stanley v. Georgia, 394 U.S. 557, 572 (Stewart, J., concurring, 1969). They then obtained a second, much broader warrant, returned to plaintiff's premises, again engaged in "unconfined

searches," and this time greatly increased their "indiscriminate seizures." These two searches, when viewed together, or when viewed separately, were clearly general searches designed and conducted "in the hope that evidence of crime might be found." Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931); accord, United States v. Rabinowitz, 339 U.S. 56, 62 (1950); Kremen v. United States, 353 U.S. 346 (1957); Von Cleef v. New Jersey, 395 U.S. 814 (1969); Lo-Ji Sales, Inc. v. New York, supra. The intolerable scope and intensity here was particularly indefensible because it was premeditated. The agents deliberately chose to use the first search as a vehicle for a second search. They had decided in advance to seize, make note of, or photograph anything which would help them in their investigation, and they followed this plan at both searches.

The agents added a new wrinkle to the fabric of exploratory searches. Instead of physically seizing all items uncovered during their initial exploration of petitioner's premises, which they knew they could not justify constitutionally, they made notes about them and then obtained a second warrant for their seizure. But this efort to adhere to procedural regularity did not alter the substantive exploratory, rummaging character of the searches. The Fourth Amendment does not allow the use of alternative devices to seize materials. That which may not be obtained directly may not be acquired indirectly. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

By the time the second search was finished, virtually every nook and cranny of petitioner's three-story premises had twice been thoroughly searched. The reception area, offices, and warehouse area had all been combed for ten hours by

more than a score of agents. Over two thousand pages of business documents had been seized, most of these under the second warrant, a general warrant which authorized seizure of nearly every document on the premises. Three copies of thirty-five films and fifty-one magazines had been seized.[5] Twenty-five of the films and thirteen of the magazines were seized under authority of the second warrant, which had been issued on the basis of information obtained by the illegal notetaking during the first search, and without probable cause.

Many of the business documents seized were taken despite the agents' awareness that they were outside the scope of the warrant they were supposedly executing. As Agent Grotz admitted, they did not feel

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[5] Many of these items were later offered as evidence at petitioner's criminal trial which resulted in a jury determination that the materials were protected by the First Amendment.

themselves bound by the language of the warrants. When they came across documents which were particularly far beyond the warrant authorization, such as credit card numbers, or of a sensitive nature, such as attorney-client letters, they copied them if they felt they might be useful to their investigation. This copying, which was a seizure within the meaning of the Fourth Amendment, United States v Gray, 484 F. 2d 352 (6th Cir. 1973), cert. denied, 414 U.S. 1158 (1974) was as violative of plaintiff's privacy as the physical seizure of documents.

The excesses indulged in by the agents established an unreasonable search, in violation of the Fourth Amendment. See, e.g., Go-Bart Importing Co. v. U.S., supra; Kremen v. United States, supra; Von Cleef v. New Jersey, supra; Lo-Ji Sales, Inc. v. New York, supra.

The government has introduced a novel approach to circumventing Fourth Amendment

mandates under the guise of so-called "innocent" notetaking. But the fact remains that these searches were general exploratory searches - the very evil the Fourth Amendment was drafted to prevent. In view of the novelty of the government's approach and the substantial threat posed to the Fourth Amendment by these novel, but no less illegal, procedures, petitioner respectfully requests this Court to grant its Petition for a Writ of Certiorari.

CONCLUSION

The record in this case demonstrates a clear attempt by the government to overrun Fourth Amendment strictures which the founding fathers and years of intervening case law have determined to be necessary limitations on police behavior in a free society.

The imaginativeness of its technique ought not to obscure the danger of allowing the government to profit by its

deliberate bypass of constitutional command.

In a bifurcated attempt to circumvent legitimate limitations on their conduct, government law enforcement officials first entered plaintiff-appellant's warehouse under a warrant which was defective not only because it was issued without a predicate showing of probable cause, but because the magistrate who issued it compromised his neutrality by making a materially prejudicial misstatement of fact on the warrant itself. Thereafter, and as a part of its total design to avoid its Fourth Amendment responsibilities, the officers reentered the warehouse under the authority of an overbroad warrant issued without probable cause and on the basis of information improperly obtained in the first search. Their subsequent search and seizure was so broad, so massive, so far beyond the reasonable scope of the authority of the warrant as to constitute

a bad faith general search. The court below gave judicial imprimatur to this governmental misconduct despite clear constitutional repugnance to the invasion of privacy so clearly depicted in this record.

It remains for this Court, if it intends to keep the Fourth Amendment from becoming no more than a precatory promise, an historical curiosity, to renounce as unconstitutional the searches and seizures which occurred in this case.

Petitioner respectfully urges this Court to grant its Petition for a Writ of Certiorari.

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CLERK

No. 82-1676

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SOVEREIGN NEWS COMPANY,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 80-3197

SOVEREIGN NEWS COMPANY,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA

Defendant-Appellee.

Before: MERRITT and MARTIN, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

J U D G M E N T

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court

that the judgment of the said District Court in this cause be and the same is hereby affirmed and case is remanded for further proceedings consistent with the opinion of this Court.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF
THE COURT

John P. Hehman, Clerk

/s/John P. Hehman
Clerk

Issued as Mandate:
January 19, 1983
COSTS: None

Filing Fee....$
Printing.....$

Total.....$

A True Copy.

Attest:

/s/George McCarthy
Deputy Clerk

No. 80-3197

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOVERIEGN NEWS CO.,	)	
	)	
Plaintiff-Appellant,	)	ON APPEAL from
	)	the United
v.	)	States District
	)	Court for the
UNITED STATES OF AMERICA,	)	Northern Dis-
	)	trict of Ohio.
	)	
Defendant-Appellee.	)	

Decided and Filed October 6, 1982.

Before: MERRITT and MARTIN, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

BOYCE F. MARTIN, JR., Circuit Judge. The Sovereign News Company appeals an order denying a motion for the return of copies of property seized during an obscenity investigation. The United States seized certain films, books, and business records during the investigation which culminated in a 1978 trial and

acquittal. After the trial, the government returned all original evidence, but retained copies of the business records. Sovereign News then filed this motion under Fed. R. Crim. P. 41(e), claiming that the government must also return the copies because the originals were illegally seized. In 1976, while the obscenity proceedings were pending, Sovereign News filed a similar motion relating to the original evidence. This court held that it did not have jurisdiction to hear the 1976 motion because of the ongoing obscenity prosecution. Sovereign News Company v. United States, 544 F.2d 909 (1976) (per curiam), cert. denied, 434 U.S.817 (1977). In the present matter, the United States urges us to reach a similar holding of "no jurisdiction" because the government claims the business records in question are now relevant to an ongoing criminal

tax investigation.

Sovereign News, on the other hand, contends that the government obtained the business records as the result of two illegal searches on March 19 and 25, 1975, made in reliance on invalid search warrants.

Both parties' arguments are without merit. We assert jurisdiction over the appeal and affirm the decision of the District Court. However, we hold that when the government has no further legitimate use for the records, it must return the copies as well as the originals.

I. Jurisdiction

The government bases its jurisdictional argument on our decision in the first Sovereign News case and DiBella v. United States, 369 U.S.121 (1962). In DiBella,

the Supreme Court held that the denial of a motion for the return of property is appealable only if it is not tied to a criminal prosecution in esse, i.e., in progress. 369 U.S. at 131-32. However, if a prosecution is in progress, "[the 41(e) motion] shall be treated also as a motion to suppress under Rule 12." Fed. R. Crim. P. 41(e). Motions to suppress evidence are "truly interlocutory" and not appealable. DiBella v. United States, 369 U.S. at 131; Cogen v. United States, 278 U.S. 221 (1929). The government contends that since a grand jury allegedly has been empanelled to hear the results of the tax investigation, we must apply the DiBella rule again. We disagree.

The government admits that it did not raise this question before the District Court and that the issue does not appear

on the record. A party may not by-pass the fact-finding process of the lower court and introduce new facts in its brief on appeal. Richardson v. Blanton, 597 F.2d 1078, 1079 (6th Cir 1979), cert. denied, 444 U.S. 886 (1979). Therefore, we decline to exercise any discretion we might have under the "plain error" doctrine. Fed. R. Crim. P. 52(b). Fed. R. App. P. 10(e). United States v. Bowling, 351 F.2d 236, 241 (6th Cir. 1965), cert. denied, 338 U.S. 908 (1966). Additionally, the criminal prosecution must be "in being" to render a 41(b) motion interlocutory. A criminal prosecution is not "in being" if it is still in the investigatory stage. Mr. Lucky Messenger Service, Inc. v. United States, 587 F.2d 15, 16 (7th Cir. 1978).

Because no indictment has been issued and no charges have been filed in any tax

proceeding, the District Court's decision is a final appealable order. While we do not establish any hard and fast rule for determining when a criminal prosecution becomes "in being" for purposes of the DiBella rule, we find that the mere possibility of a prosecution is too remote "to deprive the district court's order of finality." United States v. Premises Known as 608 Taylor Ave., 584 F.2d 1297, 1301 (3d Cir. 1978). In the present case, the government seized appellant's business records in 1975 for an obscenity investigation which ended in 1978. It is now 1982. We will not permit the government to characterize the present appeal as "interlocutory" because the same evidence may or may not be relevant to a completely different investigation. In so doing, we would postpone appellant's access to appellate

review indefinitely. We do not interpret DiBella to require such as result. United States v. Premises Known as 608 Taylor Ave., 584 F.2d at 1301. See also Hunsucker v. Phinney, 497 F.2d 29 (5th Cir. 1974), cert. denied, 420 U.S. 927 (1975); Richey v. Smith, 515 F.2d 1239 (5th Cir. 1975).

II. The Searches

A. The First Search

The government conducted the first search on March 19, 1975. Sovereign News challenges the validity of that search on two grounds. First, it contends that the search warrant was invalid because of a misrepresentation by the issuing magistrate. Second, Sovereign News contends that the government agents committed a separate illegal seizure by taking notes of other evidence unrelated to the items listed in the search warrant.

On March 14, FBI Agent George Grotz presented ten films and several stacks of magazines to Magistrate Herbert T. Maher. Magistrate Maher viewed between three and five of the films in their entirety. He then viewed selected sections of other films by holding them up to a light to determine if they were similar to the other films. Finally, he examined the contents of the top magazine in each stack before him.

On March 18, Grotz and United States Postal Inspector Ronald Baranowski appeared before Maher seeking a search warrant for the premsies of Sovereign News. In support of the warrant, Grotz and Baranowski submitted an affidavit which listed the titles of the ten films and forty-nine magazines which Grotz and Baranowski described as obscene and believed to be in Sovereign News' warehouse. The affidavit stated that, based

on information received from a confidential informant, federal agents in Texas had intercepted these films and magazines in packages mailed by Sovereign News in Cleveland to an "adult bookstore" in Fort Worth. The affidavit stated that Agent Grotz had reviewed the contents of all the item listed and described those contents as depicting "acts of sexual intercourse, fallatio [sic], cunnilingus, analingus, ejaculation and masturbation." The remainder of the thirty-three page affidavit detailed the facts and circumstances supporting the belief that the Sovereign News Company was engaged in the interstate transportation of similar magazines and films.

On the basis of the affidavit and his own examination, Magistrate Maher issued a search warrant which authorized the seizure of three evidentiary copies of each of the ten films and forty-nine

magazines named in the affidavit. The magistrate attached the affidavit to the warrant as Exhibit B and attached a list of the films and magazines as Exhibit A. The warrant also authorized the seizure of "records, receipts, notations, bills of lading, journals, ledgers, billing invoices, inventories and other documents reflecting the importation, receipt, and shipment of aforementioned obscene material in interstate commerce or by the U.S. Postal Service." In the space reserved for the "facts tending to establish the foregoing grounds for issuance of a Search Warrant," Magistrate Maher first listed "See attached affidavit: Exhibit B." He then added that "[o]n March 14, 1975, U.S. Magistrate Herbert T. Maher was presented with and did examine copies of the magazines and motion picture films listed in Exhibit A."

Sovereign News argues that this misstatement on the face of the warrant invalidated the warrant under Franks v. Delaware, 438 U.S. 154 (1978). In Franks, the Supreme Court held that a defendant could challenge the veracity of a warrant affidavit. Id. at 165. The Court sought to avoid deception of the magistrate by the affiant. The danger of deception does not exist here. Sovereign News does not contend that the affidavit was false or misleading in any way. Therefore, Franks, which concerns false affidavits, does not control the instance case.

Furthermore, Magistrate Maher went beyond the law's requirements by personally examining the target materials. He could have issued the warrant on the basis of the affidavit alone. Instead, he investigated a representative sample of the materials presented to him. United

States v. Espinoza, 641 F.2d 153, 162-64 (4th Cir. 1981), cert. denied, --U.S.--, 102 S.Ct. 153 (1981); United States v. Thomas, 613 F.2d 787, 790 (10th Cir.), cert. denied, 449 U.S. 888 (1980. United States v. Middleton, 599 F.2d 1349 (5th Cir. 1979). In this case, as in Middleton, the affidavit "related these passages in graphic detail, thereby enabling the magistrate 'to focus searchingly on the question of obscenity.'" 599 F.2d at 1359. Magistrate Maher's action was a good faith effort to protect the appellant's rights. His statement on the warrant did not compromise the validity of the information he had received and was at worst a superfluous technical error. We will not penalize the law enforcement authorities by overturning this otherwise valid warrant. United States v. Ventresca, 380 U.S. 102, 109 (1965).

Sovereign News also argues that Magistrate Maher's misstatement evidenced bias on his part and, therefore, makes the warrant invalid under Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979). In Lo-Ji, the magistrate issued an essentially blank search warrant which he completed after accompanying the police on their search of an adult bookstore. As a result, the magistrate became a member of the investigating unit. That is not the case here. Magistrate Maher's statement is insufficient to destroy his status as a "neutral and detached magistrate." Collidge v. New Hampshire, 403 U.S. 443, 449-53 (1971).

Appellant next argues that the taking of notes by the agents constitutes an illegal search and seizure. In support of this argument, Sovereign News cites this court's decision in United States v. Gray, 484 F.2d 352 (6th Cir. 1973),

cert. denied, 414 U.S. 1158 (1974). The Gray case involved the search of a house for evidence of a "moonshine" operation. During the search, the officers saw several rifles in the suspect's closet. They removed the rifles to another room and copied the serial numbers. A trace of the numbers revealed the rifles to be stolen property. We reversed the defendant's conviction for violation of firearms statutes, 18 U.S.C. §§992(h)(1) and 922(j), because the officers had "seized" the rifles which were not listed in the search warrant. "[T]here was no nexus between the rifles and the crimes of selling or possessing intoxicating liquor without a license; nor did the officers have knowledge that the rifles were evidence of any other crime." 484 F.2d at 355. The police may not seize "one thing under a warrant describing

another." Marron v. United States, 275 U.S. 192, 196 (1927).

However, in this case, there is an obvious nexus between the items "seized" by the officer's notation and the focus of the search warrant. The officers who searched the premises of Sovereign News did not open boxes containing materials not listed in the warrant nor did they peer into areas which could not have contained the specified items. The officers noted the titles of films and magazines which were in plain view during the course of their search. In addition, they took note of other business records. The government used these notes to prepare a second search warrant. The information related to the warrant being executed was gathered in an unobtrusive manner. Thus, the facts meet the primary requirements of the "plain view" doctrine. Briefly, those requirements are: (a) the officer must be

lawfully on the premises; (b) the incriminating nature of the evidence seized must be immediately apparent; and (c) the discovery must be inadvertent. See Coolidge v. New Hampshire, 403 U.S. at 465-71.

The facts here also fit United States v. Espinoza. In Espinoza, agents photographed the defendant's office and warehouse during an obscenity investigation. The court excused the "seizure" of the agent's "mental images" under the plain view exception. The photographer was lawfully present on the premises; the images were evidence of criminal activity; and the evidence was found inadvertently. United States v. Espinoza, 641 F.2d at 166-67.

Appellant argues that the "seizure" by note-taking was neither inadvertent nor properly limited to evidence whose

incriminating nature was immediately apparent. Neither argument is persuasive. First, the fact that the officers expected to find non-listed, obscene materials during the warrant's execution does not rule out inadvertence.

> There are many times when a police officer may "expect to find evidence in a particular place, and that expectation may range from a weak hunch to a strong suspicion. However, the Fourth Amendment prohibits either a warrant to issue or a search based on such an expectation. Yet if in the course of an intrusion wholly authorized by another legitimate prupose, that hunch or suspicion is confirmed by an actual observation, the police are in precisely the same position as if they were taken wholly by surprise by the discovery.

United States v. Hare, 589 F.2d 1291, 1294 (6th Cir. 1979). Second, the affidavit submitted for the second warrant described the outside appearance of the noted materials in graphic detail. This description was sufficient to justify

noting the materials as possible evidence of criminal activity directly related to the activity under investigation.

We conclude that the note-taking in the present case was not an illegal seizure. The notes concerned objects related to the search in progress; the objects were in plain view and the objects were discovered inadvertently.

B. The Second Search

On March 25, Agent Grotz returned to Magistrate Maher to obtain a warrant for another search of Sovereign News' premises. Grotz submitted an affidavit which reviewed the results of the first search and listed the magazines and films observed but not seized. The affidavit noted that certain magazines were seen "in plain view" and stated that the magazine covers "vividly depicted obscene sexual activites between males and females, males and males,

females and females, including acts of fellatio, cunnilingus, and ejaculation, of the same kind which were seized pursuant to the aforementioned search warrant." In addition, the affidavit stated that numerous boxes of eight millimeter films were observed "in plain view" and that the covers of the boxes "also depicted obscene sexual activities between males and females, males and males, females and females, which included obscene sexual acts of fellatio, cunnilingus and ejaculation and masturbation." The affidavit then listed the titles of the magazines and films which were seen in plain view. Furthermore, the affidavit listed certain business records observed during the search "reflecting the ongoing interstate shipments of obscene material." Finally, the affidavit described an FBI investigation concerning a recent shipment of

obscene magazines from a company in San Fernando, California, to Sovereign News.

After examining the affidavit, Magistrate Maher issued the requested warrant. The warrant authorized the seizure of three evidentiary copies of each of the listed films and magazines as well as "other magazines and movies of the same kind and nature." The warrant also authorized the seizure of "records, receipts, notations, bills of lading, journals, ledgers, billing invoices, inventories, and other documents reflecting the importation, receipt, and shipment" of sizeable publications as well as "docments reflecting the corporate structure of Sovereign News Company and any of its affiliate companies."

Sovereign News attacks the warrant on the grounds that (1) there was not enough probable cause shown and that (2) the

warrant was impermissibly broad. Again, we do not agree.

First, Sovereign News argues that Marcus v. Search Warrant, 367 U.S. 717 (1961), invalidates the warrant in question. In Marcus, the Supreme Court invalidated a warrant based "on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene." 367 U.S. at 731-32. The Marcus warrant did not contain either a list or a specific description of the publications to be seized. Rather, the warrant allowed the officers to make "ad hoc decisions" with complete discretion. 367 U.S. at 732.

Appellant also relies upon Lee Art Theater v. Virginia, 392 U.S. 636 (1968), in which the Supreme Court invalidated a warrant which stated only the title of the

pictures and "that the officer had determined from personal observation of them and of the billboard in front of the theatre that the films were obscene." 392 U.S. at 636. The Court invalidated the warrant because the justice of the peace issued the warrant "solely upon the conclusory assertions of the police officer" and "without any inquiry...into the factual basis for the officer's conclusions." 392 U.S. at 637.

Conclusions alone are insufficient to support a warrant, as are descriptions of only the titles or covers of the materials. See, e.g., United States v. Tupler, 564 F.2d 1294 (9th Cir. 1977). The magistrate's decision must rest upon a consideration of the contents of the work as a whole. Miller v. California, 413 U.S. 15 (1973). Since the underlying affidavit, in the present case, provided only the titles and descriptions of the materials covers, the second warrant, when viewed alone,

would fail the constitutional test.

However, we cannot view the second warrant in a vacuum. The Supreme Court stated that "affidavits for search warrants ...must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion." United States v. Ventresca, 380 U.S. 102, 108 (1965). The same magistrate issued both warrants only seven days apart at the request of the same agent who was conducting the same investigation. The second affidavit recounted both the first search and the nature of the items collected. The affidavit then provided a list of materials whose titles and covers strongly suggested that they were of the same variety as those already seized. This court has allowed probable cause to be established by reading related affidavits in conjunction with one another. United States v.

Manufacturers National Bank of Detroit, 536 F.2d 699 (6th Cir. 1976), cert. denied, 429 U.S. 1039 (1977).

> The October 7th affidavit did not contain the detailed information concerning the Detroit numbers operations which was set forth in the affidavit of the previous day. After repeating the opening paragraphs of the earlier affidavit verbatim, it was limited to a statement of the results of the search of the Wingate residence and the assertion that the evidence gained in this search established probable cause for a search of safety deposit box #127. The magistrate was entitled to consider the October 6th affidavit in conjunction with the one presented the following day in determining whether probable cause had been established for a search of the bank box of appellants. Both affidavits referred to the same eighteen-month investigation and the alleged complicity of James Wingate in the Detroit numbers operations. The second affidavit referred specifically to the search warrant which the magistrate had issued the previous day.

536 F.2d at 702. See also United States

v. Dudek, 560 F.2d 1288 (6th Cir. 1977), cert. denied, 434 U.S. 1037 (1978); United States v. Cortellesso, 601 F.2d 28 (6th Cir. 1979), cert. denied, 444 U.S. 1072 (1980).

The two warrants read together establish a sufficient nexus between the contents of items seized in the first search and the contents of the items described in the second search warrant. Because the magistrate and the investigating officer had viewed the contents of the items seized in the first search, they had probable cause to believe the materials listed in the second warrant were obscene.

In reviewing this case, we must remember that the Supreme Court has specifically stated that that magistrate need not view a film before seizing it. Heller v. New York, 413 U.S. 483, 488 (1973). "In dealing with probable cause...as the very name implies, we deal with probabilities."

Brinegar v. United States, 338 U.S. 160, 175 (1949). Furthermore, "deference is to be accorded an independent judicial officer's finding of probable cause, with doubtful cases governed largely by the preference which our legal system gives to warrants." United States v. Jenkins, 525 F.2d 819, 824 (6th Cir. 1975). See Spinelli v. United States, 393 U.S. 410, 419 (1969).

In summary, we have already found that the initial search complied with the rule of Marcus v. Search Warrant. Rather than seizing other apparently obscene material, the agent recorded what they observed in plain view. The agents could not view the contents of the material without violating the appellant's privacy rights and other rights under the First and Fourth Amendments. See, e.g., United States v. Gray. Therefore, they did the only thing

they could do. They returned to the magistrate and sought his independent determination concerning probable cause to seize materials which appeared to be of a similar nature. The materials bore similar pornographic covers and suggestive title and were in the same location as the first group of materials. Thus, viewing the second affidavit in light of the existing circumstances and the results of the first search, the magistrate had ample evidence for finding of probable cause under the Miller standard.

Appellant contends that the second warrant is facially overbroad because of the phrase which authorizes the seizure of "other magazines and movies of the same kind and nature." Appellant argues that this clause turns the warrant into a "general warrant," or "a general, exploritory rummaging in a person's belongings" which the Fourth Amendment prohibits. Coolidge v. New Hampshire, 403 U.S. at 467.

This charge is even more serious where the items to be seized have the presumptive protection of the First Amendment - i.e., books and the ideas they contain. Stanford v. Texas, 379 U.S. 476, 485 (1965).

However, appellant admits that the agents seized only magazines and movies listed in the exhibit attached to the warrant. Therefore, the materials received the required protection under the second warrant. We refuse to invalidate the entire warrant as appellant requests. Where the police and the issuing magistrate have listed the titles of the primary targets of the search, we will not invalidate the entire warrant. Rather, we will sever and invalidate those portions containing theoverbroad language and allow the itmes seized under the proper section to stand as evidence. United States v. Espinoza, 641 F.2d at 164-65;

United States v. Torch, 609 F.2d 1088, 1089-90 (4th Cir. 1979), cert. denied, 446 U.S. 957 (1980). See also W. LeFave, 2 Search and Seizure: A Treatise on the Fourth Amendment, § 4.6(f) (1978).

Appellant attempts to compare the facts of this case to the facts of Marcus and Lo-Ji. We see no analogy. In both of those cases the authorities made little or no attempt to identify beforehand the materials to be seized. Instead, the exeucting officers exercised "unfettered discretion" to seize whatever materials they thought were obscene. This is the evil which the Supreme Court sought to avoid when it stated that the items to be seized must be described with "scrupulous exactitude." Stanford v. Texas, 379 U.S. at 485. Here, by contrast, the authorities have not exercised unfettered discretion, but have seized only those items specifi-

cally designated. We will not overturn solid police work for errors which resulted in no harm.

Finally, Sovereign News argues that the warrant does not describe the seized business records with sufficient particularity. However, business records do not enjoy the same level of First Amendment protection as non-obscene books and magazines. Stanford v. Texas, 379 U.S. at 485 n.16; Marron v. United States, 275 U.S. 192, 198-99 (1927); United States v. Torch, 609 F.2d at 1090. The magistrate was entitled to describe these items generically in the warrant, since any greater specificity with regard to these items is virtually impossible. United States v. Cortellesso, 601 F.2d at 33; United States v. Jacobs, 513 F.2d 564 (9th Cir. 1975). Cf. Andresen v. Maryland, 427 U.S. 463 (1976).

In conclusion, we find no constitutional error in either the issuance or execution of either warrant.

III. Subsequent Return of the Copies

We now turn our attention to the subsequent disposition of the copies. "The general rule is that seized property, other than contraband, should be returned to the rightful owner after the criminal proceedings have terminated." United States v. Francis, 646 F.2d 251, 262 (6th Cir. 1981); United States v. LaFatch, 565 F.2d 81, 83 (6th Cir. 1977), cert. denied, 435 U.S. 971 (1978). This is true whether or not the original seizure was lawful. United States v. Francis, 646 F.2d at 262, n.7. Where the former defendant in criminal proceedings can show a property interest in the copies, the government must return them. Thus, the initial issue is whether Sovereign News can show a

sufficient property interest in the copies to demand their return.

The United States contends that Sovereign News does not have a property interest because the copies are "business records." This argument is based upon United States v. King, 528 F.2d 68, 69 (9th Cir. 1975) where the court refused to order the government to surrender transcripts of defendant's telephone conversations recorded by the government. Ruling on a Rule 41(e) motion the court held that defendant had not demonstrated entitlement to "lawful possession of the property which was illegally seized" as required by 41(e). Id. at 69. "He is no more the owner of the tapes and transcripts of the conversations made by the government than he is the owner of the mental impressions and memories of the government agents who intercepted the conversations." Id. In

this case, however, Sovereign News has a property interest in the copies because the business records copied were the sole property of Sovereign News. Therefore, Sovereign News has a right to the return of the copies.

However, we must balance this right against the legitimate needs of the United States. We agree that the government has a right to copy documents lawfully in its possession. United States v. Ponder, 444 F.2d 816, 820 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972). United States v. Chapman, 559 F.2d 402, 405 (5th Cir. 1977). We also agree that "[a] defendant's motion for return of property will be unavailing where the government has a continuing interest in the property." United States v. Francis, 646 F.2d 251, 263 (6th Cir. 1981). United States v. Premises Knows as 608 Taylor Avenue, 584 F.2d 1297, 1303 (3d Cir. 1978). This

"continuing interest" can include a criminal or tax investigation in progress. Warden v. Hayden, 387 U.S. 294, 307 (1967); United States v. One Residence and Attached Garage, etc., 603 F.2d 1231, 1234 (7th Cir. 1979). However, we hold that when the government has held the copies for a "reasonable time" and has no investigations in progress, it must return the copies as well as the originals. Mr. Lucky Messenger Service v. United States, 587 F.2d at 17; cf. United States v. Wallace & Tiernan Company, 336 U.S. 793, 800-801 (1948).

The United States contends that it can keep the copies indefinitely since it seized the originals lawfully. It bases this conclusion on United States v. Chapman, 559 F.2d 402 (5th Cir. 1977). We decline to interpret Chapman so broadly. The Chapman court decided that the United States properly retained copies

of gambling records to investigate tax questions concerning the defendants. Apparently, there was a legitimate use for the records. In the present case, we can conceive of no legitimate purpose for retaining these documents if the United States contemplates no actual use for them. The government may not keep the copies purely for the sake of keeping them or because it is "hopeful" they may be relevant to some future investigation. United States v. Moore, 423 F.Supp. 858, 859-60 (S.D. W.Va. 1976). This amounts to harrassment.

Therefore, on remand, the District Court should require the government to show cause why it is retaining these copies. If the copies are needed for an ongoing or proposed specific investigation, the government is entitled to retain them. See, e.g., United States v. Chapman, United States v. Murphy, 413 F.2d 1129,

1140 (6th Cir.), cert. denied, 396 U.S. 896 (1969). If the materials are being used for grand jury proceedings, we refer the court to the three tests set forth in In re Grand Jury Proceedings, 507 F.2d 963 (3d Cir. 1975). Those tests require a showing that the materials were (1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose such as harassment. Id. at 966. In order to protect the secrecy of the grand jury, the court may wish to hold the hearing in camera. See Mr. Lucky Messenger Service v. United States, 587 F.2d at 17; Shea v. Gabriel, 520 F.2d 879, 882 (1st Cir. 1975).

In summary, we hold that this court has jurisdiction to hear the case because the District Court's order denying return of the copies was a final order. Next,

we hold that the searches of March 19 and 25, 1975 were valid and legal searches. Finally, we hold that since the appellant has demonstrated an undivided property interest in the copies of the business records, it is entitled to immediate return of the copies unless the government can demonstrate that the copies are necessary for a specific investigation. We therefore affirm the order of the District Court and remand the case for further proceedings consistent with this opinion.

NO. 75-2431
75-2432

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SOVEREIGN NEWS COMPANY Plaintiff-Appellant	)	
v.	)	ORDER
UNITED STATES OF AMERICA, Defendants-Appellees	)	

Before PHILLIPS, Chief Judge, LIVELY, Circuit Judge and PECK, Senior Circuit Judge.

Appellant has filed a motion "to vacate the judgment of this court dismissing these appeals without prejudice and/or to reinstate and restore these cases to the court's active docket and for an order prescribing a schedule for disposition of these cases on the merits."

Upon consideration, it is ORDERED that said motion be denied, but without preju-

dice to the right of appellant to renew its motion in the district court for the recovery of its property alleged to have been seized unlawfully and unconstitutionally by federal agents, and, in event of the denial of said motion by the district court, to perfect an appeal to this court from such denial.

Entered by order of the Court.

/s/John P. Hehman

[Filed Feb. 14, 1980]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SOVEREIGN NEWS COMPANY	)	Nos. C75-620, C75-621
Plaintiff	)	
v.	)	
UNITED STATES OF AMERICA	)	
Defendant	)	

MEMORANDUM AND ORDER

THOMAS, J.

A jury, on July 24, 1978, acquitted Sovereign News and seven individual defendants on a multi-count indictment charging violations of the federal obscenity laws. Thereafter, Sovereign News Company moved in the Sixth Circuit Court of Appeals to vacate an earlier judgment dismissing appeals from this court's denial of the company's motion to return property seized from its premises in searches conducted on March 19 and March 26, 1975. On

September 21, 1978, the Court of Appeals entered an order denying the motion, but

> without prejudice to the right of appellant to renew its motion in the district court for the recovery of its property alleged to have been seized unlawfully and unconstitutionally by federal agents, and in event of the denial of said motion by the district court, to perfect an appeal to this court from such denial.

Subsequently, Sovereign News renewed its motion in this court for a return of property. At a motion hearing on January 18, 1980 before this court, it was disclosed that following the jury's acquittal of the defendants, all films and magazines seized in the searches of March 19 and March 26, 1975 were returned by the FBI to Sovereign News Company. At issue now are business records that were obtained in the 1975 searches and retained by the FBI.

The original Rule 41(e) motion to return property of Sovereign News Company was first heard on September 12, 1975 at which time, among other things, the court

determined that it had jurisdiction to proceed.

After an amended motion for a return of property was filed, hearings, conducted on all or parts of 12 days, began on September 26, 1975 and terminated on October 14, 1975. Magistrate Herbert T. Maher, who issued the two search warrants, and agents who participated in the searches and seizures were called as witnesses by movant, Sovereign News Company. The several grounds of movant's amended Rule 41(e) motion were held untenable by this court in several oral rulings, culminating in a final ruling on October 10, 1975.

On October 15, 1975, this court entered an order declaring in part:

> The court having rendered its oral opinions in open ourt in favor of the defendant, therefore,...IT IS ORDERED that the motion of the plaintiff for return of all seized property is hereby denied.

However, a few seized items identified by

the court on Octoer 14, 1975 were ordered returned.

With reference to the search warrant of March 18, 1975, this court entered an oral ruling on September 29, 1975. In part, it was determined with reference to the films and magazines examined by the Magistrate that

> he indeed had seen enough to determine in his judgment and within his discretion that on a random basis or on a spot-look basis, the materials were obscene.

Next it was determined that the search warrant "had enough specificity to meet [the] Fourth Amendment requirement." It was further determined that there was "ample probable cause" for the issuance of the search warrant.

With reference to the search warrant of March 25, 1975, this court entered an oral ruling on September 30, 1975. It was concluded

> that there was sufficient basis... provided...the Magistrate to focus searchingly on the issue of obscen-

> ity as to the identified materials that were to be the subject of the new search warrant that was being requested.

Further, it was determined "that probable cause existed for the issuance of the second search warrant."

At the outset of its oral ruling of October 10, 1975, it was observed:

> As the principal remaining grounds of its motion for the return of property, plaintiff Sovereign News Company asserts: 4. the warrant was a general warrant; 5. the lengthy search of everything on plaintiff's multi-level premises was a general, exploratory and unreasonable search.

The same motion had been filed as to each search. Examining "the chief thrust of plaintiff's argument with reference to items 4. and 5. of its motion," it was noted:

> In the course of the first search agents assigned to searching for films and magazines made notes of the titles and locations of certain films, magazines, and business records observed by the agents but not physically seized.

These notations and the explicit sex depicted on the film boxes served as the basis for the affidavit on which the second search warrant was issued. The government relied on the "plain view" doctrine in justifying the acts of its agents. Plaintiff Sovereign News insisted that the "plain view" doctrine was not available when First Amendment considerations are present. This threshold objection was rejected. Likewise, the court determined that, contrary to movant's contention, the agents' notations of items "observed but not physically seized during the course of the first search," constituted "mental impressions," not "seizures"; but even if they constituted seizures, they were "based on probable cause and were reasonable under all the circumstances."

Upon the "composite testimony," it was found

> that the disclosure of these films and magazines was not the product of a general exploratory search. Rather, the agents came upon these items while searching for the films and magaziens listed on Exhibit A of the first search warrant.

In further sustaining the aptness of the "plain view" doctrine in this situation, it was determined:

> Since the incriminating evidence was immediately apparent to the agents, there was no possibility for the "plain view" doctrine to be abused so as "to extend a general exploratory search from one object to another until something incriminating at last emerges." Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971).

The record refuted the claim of a "general, exploratory and unreasonable search." The evidence disclosed that with reference to magazines and films, the searchs of March 19 and 26 were confined to the specific magazines and films identified on the respective Exhibit A of each warrant. Thus, there was no searching for magazines other than those identified on the respective Exhibits A of the two

warrants.[1] Moreover, no film or magazine was seized unless business records relating to it, including documents of interstate shipment of the film or magazine were located and seized. With reference to the business records seized this court observed in its oral opinion of October 10, 1975:

> the court has had an opportunity to examine the business records covered by the 12 inventory items of the first search and the 151 inventory items of the second search. Viewed against the undisputed volume of business records actually present on the premises, the small percentage of these records seized during the first search refutes the claim that a general or exploratory search was undertaken by the government.

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1. In the first search, all 11 films identified in Exhibit A ere seized; but only 44 of the 49 magazines were located and seized. In the second search warrant, Exhbit A identified 69 titles of eight millimeter movies "observed in plain view." Only 24 movies from this list were actually seized. The government explained that no movie was seized unless business records relating to it, including documents of interstate shipment of the film, were located and seized. Of the 13 magazines listed in Exhibit A, only seven were seized. No other films or magazines were seized in either search.

> The much larger quantities seized on the second search was justified under the several items on the second search warrant. And particularly I refer to the language "to also include documents reflecting the corporate structure of Sovereign News Company and any of its affiliate companies.
>
> This language is deemed sufficienty particularized to justify the many records seized on the second search that, as this court has observed, concern the obviously far-flung and intricate corporate structure of Sovereign News and its affiliates.

At the hearing of January 18, 1980, this corut reaffirmed each of its rulings made in the oral rulings of September and October, 1975.

As seen, Sovereign News, in its original motion for return of property, did assert that each warrant was a "general warrant." However, the argument now advanced in support of that same claim was not made in connection with the original motion.[2]

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2. On Monday, October 6, 1975, the court put on the record the issues to be (Footnote Continued)

Sovereign News now argues that because of overbroad language relating to the seizure of obscene materials, the warrant of March 25, 1975 is a general warrant, invalid on its face. This invalidity, it is urged, tainted and illegalized the March 26 search and seizure of films, magazines and business records. Sovereign News concedes, however, that the films and magazines seized on March 26, 1975 were limited to magazines and films specifically identified in Exhibit A of the warrant of March 25, 1975. Moreover, Sovereign News does not assert, nor would the record support a claim, that pursuant

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resolved "in connection with the charge that each search alone and in combination, both searches, were general searches and, therefore, invalid." Thus, the discussion related to the general search claim. The "general warrant" argument now made was not one of the arguments then mde by counsel for Sovereign News. Although this reference of October 6, 1975 is offered in explanation of the absence of an earlier ruling on the issue now raised, it is not intimated that Sovereign News has waived the right to now assert a claim of facial invalidity of the warrant of March 25, 1975.

to the alleged general warrant language of the March 25 warrant, any search for unidentified magazines and films was made.

I.

The March 18 warrant states that "there is now being concealed certain property, namely"

> obscene, lewd, lascivious and filthy magazines and motion picture films (specifically listed in Exhibit A attached to this warrant) and [categories of business records]. Seizure of the specifically listed magazines and motion picture films is to be limited to three (3) evidentiary copies.

The warrant of March 25, 1975 described the "concealed" property as follows:

> obscene, lewd, lascivious and filthy magazines and motion picture films, included, but not limited to, the items listed in Exhibit A attached to this search warrant, and [categories of business records]. Seizure of the magazines and motion picture films and other magazines and movies of the same kind and nature is to be limited to three (3) evidentiary copies
>
> > to also include documents reflecting the corporate structure of Sovereign News

Company and any of its affiliate companies.

Thus, the magazines and films permitted to be seized by the warrant of March 18 are those specifically listed in attached Exhibit A (11 titles of eight-millimeter movies and 49 magazines). In contrast, the magazines and films permitted to be seized by the warrant of March 25 are expressly not limited to those specifically listed in attached Exhibit A (69 titles of eight-millimeter movies and 13 magazines). The warrant also identifies as subject to seizure "other magazines and movies of the same kind and nature."[3]

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3. Examined by counsel for Sovereign News, Magistrate Maher answered, "That is correct," when he was asked, "So by that warrant, you authorized the search for all of those films [on Exhbit A] plus others which are obscene; is that not correct?", and "You also authorized in that search warrant the seizure of other obscene, lewd, lascivious, and filthy magazines other than those listed, did you not?"

It is not suggested that the Magistrate transmitted his intent to any of the agents who conducted the search. His testimony after the event can neither add to nor subtract from the meaning conveyed

(Footnote Continued)

As to the magazines and films listed in Exhibit A of each warrant, the agent was given no discretion in selecting the materials to be seized. The agent could seize only the items listed. Unlike the March 18 warrant, however, the warrant of March 25 gave the agent some discretion in selecting materials other than those listed on the warrant's Exhibit A. If the agent determined that some other film or magazine was of the "same kind or nature" as those on Exhibit A, he was authorized by the warrant of March 25 to seize it.

Did the warrant of March 25 become invalid because it supplementally granted authority to seize magazines and films "of the same kind and nature" as the magazines and films specifically listed in Exhibit A. An absolutist might say that since this supplemental language does not "particularly" describe the"other magazines and movies of the same kind and nature," by the wording of the warrants.

then the warrant was invalid under the Fourth Amendment and should not have been issued. But this is not all.

The purpose of the Fourth Amendent requirement that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized" is to prevent "general exploratory rummaging in a person's belongings," Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). Unless a general search follows issuance of a general warrant, the evil posed by the general warrant does not materialize. All the more so there is a benign effct if, as in this case, particularly described commands of a warrant alone are executed, while supplemental general authority is neither recognized nor executed by the officers and no general search takes place.

When no nexus results between partial overbroad language of a warrant and the search for some property, an otherwise

valid search should not be invalidated. What the Fourth Amendment prohibits is an unreasonable search and seizure.

The agents did not search for any items other than those expressly itemized in the warrant of March 25. Since the warrant's overbroad language did not produce a corresonding general search, the nexus, necessary to render the seizure invalid, is missing in this case. It is therefore concluded that this specific and confined search did not otherwise become a general search because of the supplemental, over-broad language of the warrant that was ignored and not implemented by the agents.

II.

Movant relies principally on Lo-Ji Sales, Inc. v. New York, decided by the Supreme Court on June 11, 1979, 47 U.S.L.W. 4670. In Lo-Ji, a Town Justice, based on his viewing of two reels of film purchased from Lo-Ji's "adult" book store by a New York state police investigator,

and an affidavit of this investigator, issued a warrant authorizing the search of petitioner's store ad the seizure of other copies of the two films exhibited to the Town Justice. The affidavit asserted that "similar" films and printed matter portraying similar activities could be found on the premises, and that, in the affiant's belief, "the items were possessed in violation of the obscenity laws." The affidavit requested the Town Justice to accompany the investigator for the execution of the search warrant. The Town Justice agreed to go. Accordingly, the warrant contained a recital that authorized the seizure of "[t]he following items which the court independently [on examination] has determined to be possessed in violation of Article 235 of the [New York] penal law...." No items were listed or described following this statement at the time the Town Justice signed the warrant. The extra copies of the two

reels of films were the only "things to be seized" that were described in the warrant.

On arrival of the search party of eleven at the store, the store clerk was placed under arrest, an arrest warrant having been issued by the Town Justice before going to the store. Finding probable cause after viewing several films in the coin-operated projectors, the Town Justice ordered 23 silent films seized. After viewing other films (silent and sound), he found probable cause and ordered them seized. After examining some magazines and finding probable cause, he ordered these magazines, together with other copies of the same or "similar" magazines seized. In all, 397 magazines were taken. Also, four hundred thirty-one boxes of film were taken. The Town Justice found probable cause based on the pictures on the outside of the boxes which pictures the clerk stated were representa-

tive of what the films showed.

All items seized were taken to a state police barracks where they were inventoried. Each item was then listed on the search warrant, and the completed warrant was given to the Town Justice. The court observed:

> The warrant, which had consisted of two pages when he signed it before the search, by late in the day contained 16 pages. It is clear, therefore, that the particular description of "things to e seized" was entered in the document after the seizure and impoundment of the books and other articles.

After Lo-Ji Sales was charged with violation of the New York state obscenity law and before trial, a motion to suppress all of the seized material was heard and denied. Petitioner pled guilty, was fined, and appealed the denial of the motion to suppress. His appeals in the New York appellate courts were unsuccessful.

The Supreme Court reversed the judgments of conviction. It found that the

procedure previously described was flawed on two principal grounds: (1) "[t]his search warrant and what followed the entry on petitioner's premises are reminiscent of the general warrant...against which the Fourth Amendment was intended to protect"; and (2) the failure of the Town Justice to manifest the "neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure." There is no suggestion by Sovereign News, nor would the record support a claim, that Magistrate Maher, who issued both the warrant of March 18 and the warrant of March 25, lacked neutrality and detachment. Nevertheless, for present purposes, the Supreme Court's first ground for flawing the Lo-Ji search and seizure is pertinent to the present discussion.

After making the statement quoted above, the court declared:

> Based on the conclusory statement of the police investigator that other similarly obscene materials would be found at the store, the warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not permit such action. Roaden v. Kentucky, 413 U.S. 496, 502 (1973); Stanford v. Texas, [379 U.S. 476, 485 (1965)]; Marcus v. Search Warrant,[4] [367 U.S. 717, 732 (1961)].

Measured by Lo-Ji, the warrant of March 25 will be evaluated. Unlike the Town Justice's warrant, the March 25 warrant did not leave it "entirely to the discre-

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4. On their facts, none of the cited cases are deemed to control the instant case. Roaden v. Kentucky, 413 U.S. 496, (1973), invalidated seizure of a film by a sheriff who acted without a warrant. Stanford v. Texas invalidated a general search and seizure at petitioner's home of "literary material" ("books, records, pamphlets"), made pursuant to a warrant (deemed to be a general warrant) that failed to describe with particularity the things to be seized. As in Marcus v. Search Warrant, 367 U.S. 717 (1961), the Court held the Fourth Amendment requirement "that warrants must particiularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the things are books, and the basis for their seizure is the ideas they contain."

tion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure" (emphasis added). Obviously, the specific listing of magazines and films in Exhibit A did not arm the officers with any discretion in executing that portion of the March 25 warrant. Only the supplemental discretionary portion of the March 25 warrant is deemed proscribed by the foregoing language of Lo-Ji.[5]

It is not only that the Town Justice's warrant was entirely a general warrant that distinguishes Lo-Ji from this case. As the Court in Lo-Ji made clear, the general warrant, standing alone, was not

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5. Although the March 25 warrant's supplemental language enlarging the property to be seized to include "other magazines and movies of the same kind and nature" is more restrictive than the phrase "similarly obscene materials" included in the affidavit, that led to the conclusion that the warrant in Lo-Ji was general, the supplemental language gave the agents discretion to seize additional items that "were likely obscene."

the basis of the Court's decision. It was the "search warrant and what followed the entry on petitioner's premises" that the Court stated were "reminiscent to the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect." In contrast, in the present case, as seen in part I, no search for "other" magazines or films was made pursuant to the supplementary warrant language. Moreover, not a single magazine or film that was seized during the search was obtained pursuant to the supplementary discretionary language of the warrant of March 25.

Movant Sovereign News also relies on United States v. Burch, 432 F. Supp. 961 (D. Del. 1977), affirmed 577 F.2d 729 (3rd Cir. 1978). In Burch, defendant, charged with possession of automobile tires stolen from an interstate shipment, was granted suppression of the tires on the ground that they were seized in the course of an

illegal search. The warrant authorized search of defendant Jaeger's van and his garage for

> automobile tires and a green 1975 Dodge van...and other unknown articles which are believed and reported to be stolen from Penn Central Railroad....

In the search that followed, agents seized "forty-two tires, a tool box, a power lawn mower, ninety-six rolls of toilet tissue, a portable radio, an electric generator and several other items." Only the tires were offered as evidence at the trial, the other property being returned.

The court concluded "that a warrant authorizing a search for 'stolen property' is repugnant to the Fourth Amendment," although the court recognized that the warrant was specific in describing the "automobile tires." The court did not indicate whether he would have sustained the motion to suppress the automobile tires as evidence, as he did, had there been no search for "unknown articles...

reported stolen" and had there been no resulting extensive seizure of articles.

The government further argued that the seizure of the tires should be upheld since the warrant specifically described these items. Dismissing this argument, the court concluded that this specific reference "afforded no protection to Mr. Jaegers' right to be free from a general search." The court reasoned:

> The search which the warrant authorized and the search which in fact occurred, was no more narrow by reason of the inclusion of that reference then it would have been in its absence.

The court's mention of Mr. Jaegers' "right to be free from a general search" and the court's reference to the "search which in fact occurred" indicate that these factors played a part in the court's suppression of all evidence seized in the search. In effect, the court held that the search should be suppressed because a general search followed the issuance of a general

warrant. Because it is not factually apposite to the present case, in this court's view, Burch will not be followed.

Movant's counsel cite Burch for the following proposition: "Nor can the fact that the seizing officers may have selected more narrowly than an overbroad warrant permitted them to do, dilute the Fourth Amendment violation." This is an incorrect reading of Burch. As the Burch analysis shows, the "seizing officers" did not limit their search to the specifically described automobile tires. Seizing numerous items as "unknown articles... reported to be stolen from Penn-Central Railroad," they selected more broadly "than [the] overbroad warrant permitted them to do."

Also cited in support of the foregoing proposition are Bumpers v. United States, 391 U.S. 543 (1967), and Byars v. United States, 273 U.S. 28 (1926). Byars, id., at 29, followed in Bumpers, id., at 548,

holds that, "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light...." In this case, however, the court is not holding the search lawful because of what was actually seized pursuant to the warrant of March 25 but rather because the only things searched for were specifically identified in the warrant of March 25.

III.

Sovereign News agrees that if the search of March 26 was legal, its motion for return of copies of the business records seized in that search now should not be granted. Concluding that the searches of March 19 and March 26 were valid, movant's motion for return of copies of business records is denied.

IT IS SO ORDERED.

/s/ William K. Thomas
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Sovereign News Co.	)	
	)	
Plaintiff	)	
	)	Civil Action
vs	)	
	)	Number C75-620
United States of America	)	
	)	
	)	
Defendant	)	O R D E R

This matter having been consolidated for hearing with C75-621, and the court having rendered its oral opinions in open court in favor of the defendant, therefore, pursuant to Rule 58, Federal Rules of Civil Procedure;

IT IS ORDERED that the motion of the plaintiff for return of all seized property is hereby denied. However the court on October 14, 1975 ordered the return of certain seized items, as identified in open court, to which orders the government acceded.

IT IS FURTHER ORDERED

that the complaint is hereby dismissed, with prejudice, at plaintiff's costs.

/s/William K. Thomas
WILLIAM K. THOMAS,
U.S.D.C. Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Sovereign News Co.	)	
	)	
Plaintiff	)	
	)	Civil Action
vs	)	
	)	Number C75-620
United States of America	)	
	)	
Defendant	)	O R D E R

The Court having rendered its opinions in favor of the defendant, and the plaintiff having moved to restrain the use of the seized materials,

IT IS ORDERED that the oral motion of the plaintiff to stay and restrain the use of the seized materials by the Government in the ongoing Grand Jury investigation, pending appeal, is hereby denied.

/s/William K. Thomas
WILLIAM K. THOMAS
U.S.D.C. Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Sovereign News Co.	)	
	)	
Plaintiff	)	
	)	Civil Action
vs	)	
	)	Number C75-621
United States of America	)	
	)	
	)	
Defendant	)	O R D E R

This matter having been consolidated for hearing with C75-620, and the court having rendered its oral opinions in open court in favor of the defendant, therefore, pursuant to Rule 58, Federal Rules of Civil Procedure;

IT IS ORDERED that the motion of the plaintiff for return of all seized property is hereby denied. However the court on October 14, 1975 ordered the return of certain seized items, as identified in open court, to which orders the government acceded.

IT IS FURTHER ORDERED

that the complaint is hereby dismissed, with prejudice, at plaintiff's costs.

/s/William K. Thomas
WILLIAM K. THOMAS
U.S.D.C. Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Sovereign News Co.	)	
	)	
Plaintiff	)	
	)	Civil Action
vs	)	
	)	Number C75-621
United States of America	)	
	)	
	)	
Defendant	)	O R D E R

The Court having rendered its opinions in favor of the defendant, and the plaintiff having moved to restrain the use of the seized materials,

IT IS ORDERED that the oral motion of the plaintiff to stay and restrain the use of the seized materials by the Government in the ongoing Grand Jury investigation, pending appeal, is hereby denied.

/s/William K. Thomas
WILLIAM K. THOMAS
U.S.D.C. Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SOVEREIGN NEWS COMPANY 2075 East 65th Street Cleveland, Ohio 44103, Plaintiff, -vs- UNITED STATES OF AMERICA c/o United States Attorney Cleveland, Ohio DAVID FELMAN Special Attorney U.S. Department of Justice Northern Ohio Bank Building Room 526 Cleveland, Ohio 44113 FREDERICK COLEMAN U.S. Attorney Room 400 U.S. Court House & Post Office Cleveland, Ohio 44113 and GEORGE E. GROTZ, Special Agent Federal Bureau of Investigation 1240 East 9th Street Cleveland, Ohio Defendants.	)	CASE NO. C75-620 JUDGE THOMAS AMENDED MOTION FOR RETURN OF PROPERTY AND REQUEST FOR HEARING

Plaintiff, Sovereign News Company, hereby moves this Honorable Court, pursuant to F.R. Crim. P. 41(e), to order returned to it all tangible and intangible property, including but not limited to, magazines, films, business records, and personal records, as well as notes and photographs taken, seized by agents of the Federal Bureau of Investigation, U.S. Postal Service and U.S. Customs Bureau, at plaintiff's premises, situated at 2075 East 65th Street, Cleveland, Ohio, on March 29, 1975. A copy of the inventory provided plaintiff by said agents is attached hereto as Exhibit A.

The search and seizure at issue here proceeded pursuant to a search warrant issued by U.S. Magistrate Herbert T. Maher. A copy of this warrant is attached hereto as Exhibit B.

Plaintiff contends that the search and seizure violated its rights under the

First and Fourth Amendments to the U.S. Constitution, as well as Rule 41 of the Federal Rules of Criminal Procedure, for many reasons, among which are the following:

1. The affidavit on the basis of which the warrant was issued does not establish probable cause. (See Exhibit C). It contains tips from two informants which are critical to a finding of probable cause that a federal crime involving interstate transportation of allegedly obscene materials had been committed. It does not, however, establish that the informants are credible or that their information is reliable. The affidavit therefore fails to pass the two-prong test enunciated in Aguilar v. Texas, 378 U.S. 108 (1964) and explicated and elaborated upon in Spinelli v. United States, 393 U.S. 410 (1969).

2. The Magistrate did not focus searchingly on the question of obscenity, proof of which will be adduced at hearing. The search therefore violated plaintiff's First and Fourth Amendment rights. Roaden v. Kentucky, 413 U.S. 496 (1973), quoting from Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 637 (1968); see, Heller v. New York, 413 U.S. 483 (1973).

3. The search warrant is overbroad and therefore a general warrant. For example, it authorizes seizure of "records, receipts, notations, bills of lading, journals, ledgers, billing invoices, inventories, and other documents reflecting the importation, receipt and shipment of the aforementioned obscene material in interstate commerce or by the U.S. Postal Service". (Emphasis supplied). Because of the vagueness of the term "reflecting" and the absence of any

limitation on the dates of the documents whose seizure was authorized, the authorization of the warrant was overbroad, and the warrant itself a "general warrant" prohibited by the Fourth Amendment. Stanford v. Texas, 379 U.S. 476, 481-482, (1965); see Griffin v. Superior Court, 103 Cal. Rptr. 379, 26 Cal. App. 3rd 672 (1972); Aday v. Superior Court, 13 Cal. Rptr. 415, 362 P.2d 47 (1961).

4. Twenty federal agents and two officers of the Cleveland police department were on plaintiff's premises for more than five hours and conducted a general, roving and exploratory search. For example, they opened hundreds of cartons, unmarked as well as marked. They perused virtually every business record on the premises, and seized personal as well as business records which were outside the scope of the authorization

contained in the warrant. They took hundreds of photographs of the premises and of everything and everyone present at the premises. They recorded the names of scores of films and magazines, some of which were seized in a subsequent search. They seized three copies of every magazine and film listed on the warrant, although one would have well served their purpose. See, Kremen v. United States, 353 U.S. 346 (1957); Stanford v. Texas, supra, United States v. Alexander, 428 F.2d 1169 (8th Cir. 1970). And the Cleveland police who participated in the search were not authorized by the warrant to do so.

5. The mass seizure conducted by the federal and state agents was not presided by an adversary hearing contrary to the holdings of Marcus v. Search Warrant, 367 U.S. 717, 81 S. Ct. 1708 (1961), and

Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723 (1964).

6. The affidavit on the basis of which the warrant issued contained intentional and material misrepresentations which invalidate the warrant. See, e.g., United States v. Carmichael, 489 F.2d 983, 988 (7th Cir. 1973) (en banc); United States v. Thomas, 489 F.2d 664 (5th Cir. 1973).

7. And for such other and further reasons as may appear at the hearing of this matter.

WHEREFORE, plaintiff moves the Court to schedule a hearing on the within motion at the earliest practicable time, at which hearing the plaintiff will produce evidence of the allegations made in its motion, and further moves the Court upon the conclusion of such hearing to grant its motion by issuance of an order directing the defendants to return all

tangible and intangible property seized at plaintiff's premises on March 19, 1975, including all photographs and written notes made during or as a result of said search.

Respectfully submitted,

/s/Bernard A. Berkman
BERNARD A. BERKMAN
CHARLES M. DELBAUM
BERKMAN, GORDON & KANCELBAUM
2121 The Illuminating Building
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781-5245

Attorneys for Plaintiff

S E R V I C E

A copy of the foregoing Motion for Leave to Amend and Amended Motion for Return of Property was served upon David Felman, Special Attorney, U.S. Department of Justice, Northern Ohio Bank Building, Room 526, Cleveland, Ohio 44113; Frederick

Coleman, U.S. Attorney, Room 400, U.S. Court House and Post Office, Cleveland, Ohio 44113; and U.S. Attorney General, Justice Department, Washington, D.C., this 10th day of September, 1975, by depositing the same in the United States mail, postage prepaid.

/s/Charles M. Delbaum
CHARLES M. DELBAUM
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SOVEREIGN NEWS COMPANY 2075 East 65th Street Cleveland, Ohio 44103, Plaintiff, -vs- UNITED STATES OF AMERICA c/o United States Attorney Cleveland, Ohio DAVID FELMAN Special Attorney U.S. Department of Justice Northern Ohio Bank Building Room 526 Cleveland, Ohio 44113 FREDERICK COLEMAN U.S. Attorney Room 400 U.S. Court House & Post Office Cleveland, Ohio 44113 and GEORGE E. GROTZ, Special Agent Federal Bureau of Investigation 1240 East 9th Street Cleveland, Ohio Defendants.	CASE NO. C75-621 JUDGE THOMAS AMENDED MOTION FOR RETURN OF PROPERTY AND REQUEST FOR HEARING

Plaintiff, Sovereign News Company, hereby moves this Honorable Court, pursuant to F.R. Crim. P. 41(e), to order returned to it all tangible and intangible property, including but not limited to, magazines, films, business records, and personal records, as well as notes and photographs taken, seized by agents of the Federal Bureau of Investigation, U.S. Postal Service and U.S. Customs Bureau, at plaintiff's premises, situated at 2075 East 65th Street, Cleveland, Ohio, on March 26, 1975. A copy of the inventory provided plaintiff by said agents is attached hereto as Exhibit A.

The search and seizure at issue here proceeded pursuant to a search warrant issued by U.S. Magistrate Herbert T. Maher. A copy of this warrant is attached hereto as Exhibit B.

Plaintiff contends that the search and seizure violated its rights under the

First and Fourth Amendments to the U.S. Constitution, as well as Rule 14 of the Federal Rules of Criminal Procedure, for many reasons, among which are the following:

1. The affidavit on the basis of which the warrant was issued does not establish probable cause to believe that the films and magazines whose seizure was authorized had been transported in interstate commerce and a federal crime thereby committed. The affidavit merely relates that "numerous" magazines and films were observed in plain view on plaintiff's premises during the course of a previous search conducted on March 19, 1975. (See ¶4 of the affidavit, Exhibit C, attached hereto). Nothing in the affidavit establishes that they were in any way connected with interstate transportation. Hence, there was no probable cause to believe a crime had been committed, and the

seizure was conducted in violation of the Fourth Amendment.

2. The Magistrate did not focus searchingly on the question of obscenity, proof of which will be adduced at hearing. The search therefore violated plaintiff's First and Fourth Amendment rights. Roaden v. Kentucky, 413 U.S. 496 (1973), quoting from Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 637 (1968); see, Heller v. New York, 413 U.S. 483 (1973).

3. The search warrant is overbroad and therefore a general warrant. For example, it authorizes seizure of "records, receipts, notations, bills of lading, journals, ledgers, billing invoices, inventories, and other documents reflecting the importation, receipt and shipment of the aforementioned obscene material in interstate commerce or by the U.S. Postal Service." (Exhibit B; emphasis supplied). Because of the vagueness of the term

"reflecting" and the absence of any limitation of the dates of the documents whose seizure was authorized, the authorization of the warrant was overbroad, and the warrant itself a "general warrant" prohibited by the Fourth Amendment. Stanford v. Texas, 379 U.S. 476, 481-482 (1965); see Griffin v. Superior Court, 103 Cal. Rptr. 379, 26 Cal. App. 3rd 672 (1972); Aday v. Superior Court, 13 Cal. Rptr. 415, 362 P. 2d 47 (1961).

In addition, the warrant authorized seizure of "documents reflecting the corporate structure of Sovereign News Company and any of its affiliate companies." The use of the vague terms "reflecting" and "affiliate" render the warrant overbroad.

4. The government conducted a general, roving and exploratory search. For example, they perused every record and document on the premises and seized nearly

two thousand pages of business and personal documents. The bulk of these were clearly and beyond doubt outside the scope of the authority of the warrant. Personal correspondence and notes were seized, including confidential communications protected by the attorney-client privilege. Other personal and confidential communications, documents and photographs, as well as business records, were copied, but not seized. See, Kremen v. United States, 353 U.S. 346 (1957); Stanford v. Texas, supra; United States v. Alexander, 428 F.2d 1169 (8th Cir. 1970).

5. The search was also the fruit of prior illegality. Simultaneously herewith, plaintiff has filed a motion for return of property seized on its premises a week prior to the instant search, and has asserted that the materials were seized in violation of its constitutional rights. As shown by the affidavit in the instant

matter, the warrant, search and seizure at issue here are the fruits of the previous search. By reason of the fact that the initial search was illegal, the fruits of that illegal search must also be returned. Wong Sun v. United States, 371 U.S. 471 (1963). Furthermore, the fruit of any individual items which were illegally seized during the previous search must also be returned. Ibid.

6. A mass seizure conducted by the federal agents was not preceded by an adversary hearing contrary to the holdings of Marcus v. Search Warrants, 367 U.S. 717, 81 S. Ct. 1708 (1961), and Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723 (1964).

7. And for such other and further reasons as may appear at the hearing of this matter.

WHEREFORE, plaintiff moves the Court to schedule a hearing on the within motion

at the earliest practicable time at which hearing the plaintiff will produce evidence of the allegations made in its motion, and further moves the Court upon the conclusion of such hearing to grant its motion by issuance of an order directing the defendant to return all tangible and intangible property seized at plaintiff's premises on March 26, 1975, including all photographs and written notes made during or as a result of said search.

Respectfully submitted,

/s/Bernard A. Berkman
BERNARD A. BERKMAN
CHARLES M. DELMAUM
BERKMAN, GORDON and
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Building
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781-5245
Attorneys for Plaintiff

S E R V I C E

A copy of the foregoing Motion for Leave to Amend and Amended Motion for Return of Property was served upon David Felman, Special Attorney, U.S. Department of Justice, Northern Ohio Bank Building, Room 526, Cleveland, Ohio 44113; Frederick Coleman, U.S. Attorney, Room 400, U.S. Court House and Post Office, Cleveland, Ohio 44113; and U.S. Attorney General, Justice Department, Washington, D.C., this 10th day of September, 1975, by depositing the same in the United States mail, postage prepaid.

/s/Charles M. Delbaum
CHARLES M. DELBAUM
BERKMAN, GORDON &
KANCELBAUM

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE

NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

UNITED STATES OF AMERICA	)	Docket No.
	)	
	)	Case No.
vs.	)	
	)	
Sovereign News Company 2075 East 65th Street Cleveland, Ohio	)	SEARCH WARRANT

To any Agent of the Federal Bureau of Investigation or any Postal Inspector, U. S. Postal Service

Affidavit(s) having been made before me by Special Agent GEORGE E. GROTZ that he has reason to believe that on the premises known as Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio

in the Northern District of Ohio there is now being concealed certain property, namely obscene, lewd, lascivious and filthy magazines and motion picture films (specifically listed in Exhibit A attached to this warrant) and records,

receipts, notations, bills of lading, journals, ledgers, billing invoices, inventories, and other documents reflecting the importation, receipt and shipment of the aforementioned obscene material in interstate commerce or by the U. S. Postal Service. Seizure of the specifically listed magazines and motion picture films is to be limited to three (3) evidentiary copies.

**On March 14, 1975, U. S. Magistrate HERBERT T. MAHER was presented with and did examine copies of the magazines and motion picture films listed in Exhibit A.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of ten days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search in the daytime (6:00 a.m. to 10:00 p.m.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before /s/Herbert T. Maher
Federal Judge or magistrate
as required by law.

Dated this 18th day of March, 1975

/s/ Herbert T. Maher
Judge (Federal or State Court of Record) or Federal Magistrate

EXHIBIT A

The following eight (8) millimeter movies:

Lasse Braun presents Parisiana,
"Tour Eiffel", LB 37;
Lasse Braun presents Parisiana,
"Grand Prix", LB 38;
Shocking, by Lasse Braun,
"Cake Orgy", LB 40;
Shocking, by Lasse Brau (sic),
"Funny Priest," LB 41;
Shocking, by Lasse Braun,
"Psycho Doll", LB 42;
Pretty Girl Pictures presents,
"Hot Sucker", PG 21;
Esquire Finest Quality Film Productions;
"Pretty Girl", #25
Tropical, by Lasse Braun
"Paradise", LB 31;
Tropical, by Lasse Braun
"Limbo", LB 32;
Tropical, by Lasse Braun
"White Fantasies," LB 33.

The following magazines:

"Prince, #9"
"Casebook Volume 1, #3, Photographs
of unusual Sex Practices"
"Eroticon, #1;"
"Eroticon, #2;
"Sexploration", Volume 1;
"Sexploration", Volume 2;
"Sense", Volume 3, #3;
"Sense," Volume 2, #6;
"Sucking";

"Sexual Arousal - Oral Sex";
"Fucking Trios";
"Pleasure", Book 1;

"The Sex Family";
"Positions and Techniques";
"Hot Cunts";"
"Sucking and Fucking";
"Oral Love", #215
"Image", #216
"Eze Time", #217
"Sex Tech"
"Fun-Love Nympho"
"Sex Act", Book 1;
"Sex Act", Book 2;
"Fucking Couples", Volume #1;
"Nique," Book 1;
"Children of Love", Volume 1, #1;

"Sucking Sisters", Volume 1, #1;
"The Superstars of Porno";
"Rear Entry," Volume 1;
"Loving-Fucking", Volume 1;

"Foreplay";
"Casebook," Volume 2, #6;
"Answers," Volume 3, #1;
"Answers," Volume 3, #2;
"Answers," Volume 3, #3;
"Answers", Volume 3, #4;
"Response," Volume 1, #4
"Response," Volume 3, #1;
"Response", Volume 3, #4;
"Sense", Volume 3, #4;
"Sex in Marriage", Volume 3, #1;
"Sex in Marriage", Volume 3, #2;
"Sex in Marriage", Volume 3, #3;
"Sexscope", Volume 2, #5;
"Sexscope", Volume 2, #6;
"Sexscope", Volume 3, #1;
"Sexscope", Volume 3, #2;
"Sexscope", Volume 3, #3;

UNITED STATES DISTRICT COURT
FOR THE

NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

UNITED STATES OF AMERICA	Magistrate's Docket No.____
vs.	Case No.____ at ___o'clock__M
Sovereign News Company 2075 East 65th Street Cleveland, Ohio	AFFIDVAIT FOR SEARCH WARRANT

BEFORE HERBERT TO MAHER, Cleveland, Ohio

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as Sovereign News Company, 2075, East 65th Street, Cleveland, Ohio

in the Northern District of Ohio there is now being concealed certain property, namely obscene, lewd, lascivious, and filthy magazines and motion picture films, (specifically listed in Exhibit A and attached to this affidavit), and records, receipts, notations, bills of

lading, journals, ledgers, billing invoices, inventories, and other documents reflecting the importation, receipt and shipment of the aforementioned obscene material in interstate commerce or by the U. S. Postal Service.* Seizure of the specifically listed obscene, lewd, lascivious and filthy magazines and motion picture film is to be limited to three (3) evidentiary copies,
which are evidence of violation of Title 18, United States Code, Sections 1461, 1462 and 1465.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:
See attached affidavit: Exhibit B

**On March 14, 1975, U.S. Magistrate HERBERT T. MAHER was presented with and did examine copies of the magazines and motion picture films listed in Exhibit A.

/s/George E. Grotz
/s/Ronald E. Baranowski

_____
Special Agent, FBI,

Sworn to before me, and subscribed in

my presence, March 18, 1975

/s/Herbert T. Maher
HERBERT T. MAHER
United States Magistrate

EXHIBIT A

The following eight (8) millimeter movies:

Lasse Braun presents Parisiana,
"Tour Eiffel", LB 37;
Lasse Braun presents Parisiana,
"Grand Prix", LB 38;
Shocking, by Lasse Braun,
"Cake Orgy", LB 40;
Shocking, by Lasse Brau (sic),
"Funny Priest," LB 41;
Shocking, by Lasse Braun,
"Psycho Doll", LB 42;
Pretty Girl Pictures presents,
"Hot Sucker", PG 21;
Esquire Finest Quality Film Productions;
"Pretty Girl," #25
Tropical, by Lasse Braun
"Paradise", LB 31;
Tropical, by Lasse Braun
"Limbo", LB 32;
Tropical, by Lasse Braun
"White Fantasies," LB 33.

The following magazines:

"Prince, #9"
"Casebook Volume 1, #3, Photographs
of unusual Sex Practices"
"Eroticon, #1;"
"Eroticon, #2;"
"Sexploration", Volume 1;
"Sexploration", Volume 2;
"Sense", Volume 3, #3;
"Sense," Volume 2, #6;
"Sucking";

"Sexual Arousal - Oral Sex";
"Fucking Trios";
"Pleasure", Book 1;

"The Sex Family";
"Positions and Techniques";
"Hot Cunts";
"Sucking and Fucking";
"Oral Love", #215,
"Image", #216
"Eze Time", #217
"Sex Tech"
"Fun-Love Nympho"
"Sex Act", Book 1;
"Sex Act", Book 2;
"Fucking Couples", Volume #1;
"Nique," Book 1;
"Children of Love", Volume 1, #1;

"Sucking Sisters", Volume 1, #1;
"The Superstars of Porno";
"Rear Entry," Volume 1;
"Loving-Fucking", Volume 1;

"Foreplay";
"Casebook," Volume 2, #6;
"Answers," Volume 3, #1;
"Answers," Volume 3, #2;
"Answers," Volume 3, #3;
"Answers," Volume 3, #4;
"Response," Volume 1, #4;
"Response", Volume 3, #1;
"Response", Volume 3, #4;
"Sense", Volume 3, #4;
"Sex in Marriage", Volume 3, #1;
"Sex in Marriage", Volume 3, #2;
"Sex in Marriage", Volume 3, #3;
"Sexscope", Volume 2, #5;
"Sexscope", Volume 2, #6;
"Sexscope", Volume 3, #1;
"Sexscope", Volume 3, #2;
"Sexscope", Volume 3, #3;
"Sexscope", Volume 3, #4;

A F F I D A V I T

1. I GEORGE E. GROTZ, hereinafter referred to as Affiant A, am employed as a Special Agent of the Federal Bureau of Investigation and I have continually held that position for the past three and a half years. Affiant A has been assigned to the investigation of Interstate Transportation of Obscene Matter cases within the jurisdiction of the Northern District of Ohio since December, 1973 and has supervised an investigation involving the Interstate Transportation of Obscene Matter by the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio, since December, 1973. In accordance with this assignment, Affiant A has received reports of investigation conducted by other Special Agents of the Federal Bureau of investigation and has had this information available to him for his utilization

in this investigation. This information includes the results of physical surveillances, information from telephone company records and information obtained from confidential informants. These confidential sources of information have provided reliable information on numerous occasions in the past which has been corroborated by subsequent investigation of Special Agents of the Federal Bureau of Investigation.

2. Affiant A adopts and incorporates the information contained herein as his affidavit. Affiant A has read this affidavit and is satisfied the information contained herein is reliable.

3. RONALD E. BARANOWSKI, hereinafter referred to as Affiant B is employed as a Postal Inspector assigned to the Postal Inspector's Office, United States Postal Service, Cleveland, Ohio and has continu-

ally held that position for the past three years. Affiant B has been assigned to the investigation of postal violations regarding the transmittal of obscene matters through the mail for the past two years. In accordance with this assignment, Affiant B has worked closely with Affiant A with regards to the investigation of the Interstate Transportation of Obscene Matter by the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio. Included in the information contained in this affidavit is the results of information obtained from the United States Postal Service records. Affiant B adopts and incorporates the information contained herein as his affidavit. Affiant B has read this affidavit and is satisfied that the information contained herein is reliable.

4. Based upon the information contained herein, Affiants A and B have reason to believe and do believe that

there is probable cause that REUBEN STURMAN, SAMUEL JOSEPH and others as yet unknown doing business as the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio are now committing and will continue to commit offenses against the United States. The aforementioned Sovereign News Company located at 2075 East 65th Street, Cleveland, Ohio under the management and direction of REUBEN STURMAN, SAMUEL JOSEPH and others unknown at this time, have imported or have caused to be imported into the United States obscene, lewd, lascivious and filthy material in the form of books, magazines and motion-picture films. All in violation of Title 18, United States Code, Section 1462. In addition, the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio has knowingly used the United States Postal Service for the mailing, carriage

in the mails or delivery of obscene, lewd, lascivious and filthy material. All in violation of Title 18, United States Code, Section 1461. Further, Affiants A and B have reason to believe and do believe that REUBEN STURMAN, SAMUEL JOSEPH and others as yet unknown doing business as the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio have knowingly transported in Interstate Commerce via the United Parcel Service, an interstate express company, or other common carrier obscene, lewd, lascivious and filthy material for the purpose of sale and distribution, and will continue to commit said transportation of obscene lewd, lascivious, indecent and filthy material for sale and distribution in violation of Title 18, United States Code, Section 1465.

5. On May 2, 1974, Affiant A determined through a confidential source of information, hereinafter referred to as confidential source number one, who resided in the

Columbus, Ohio area, that REUBEN STURMAN, doing business as the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio, is one of the largest distributors of obscene materials in the United States. Confidential source number one advised that he had been purchasing obscene material from REUBEN STURMAN since 1965 and had observed an individual, known to him as HARVEY HORWITZ, an employee of Sovereign News Company in Cleveland, to deliver obscene material to various adult bookstores in the Columbus, Ohio area. Confidential source number one further advised that REUBEN STURMAN controls Sovereign News Company and that STURMAN sets the policy for the type of material that he handles. Confidential source number one advised that STURMAN has intentionally removed his name from any of the corporate records of the Sovereign News

Company and from any of the other affiliated or subsidiary companies associated, or owned or controlled by Sovereign News Company. Confidential source number one stated REUBEN STURMAN has intentionally removed his name from associations with the Sovereign News Company in order to disguise his ownership and managerial role in the Sovereign News Company. Confidential source number one further advised that HORWITZ, often accompanied by an individual who confidential source number one believed was called JOHN, and whose last name he did not know, would supply the adult bookstores in Columbus, Ohio once a week with obscene material. This obscene material was in the form of magazines, paperback novels and eight millimeter films. According to confidential source number one, this material vividly portrayed obscene acts of sexual intercourse, acts of fellatio and cunnilingus.

Affiant A has examined samples of the aforementioned obscene materials and has found that confidential source number one's description was accurate. According to confidential source number one, HORWITZ and JOHN (last name unknown), after supplying the bookstores in Columbus, would on certain occasions travel to other Ohio towns and would thereinafter travel interstate to supply obscene material to adult bookstores in the Indianapolis, Indiana area. Confidential source number one advised that much of the obscene material furnished to him by the Sovereign News Company, was obtained by the Sovereign News Company from Parliament News Agency in Chatsworth, California.

6. On May 2, 1974, Affiant A, in the presence of Special Agents ROBERT K. RESSLER and PHILLIP R. KERBY, interviewed confidential source number one. At the time of the interview, Special Agent

ROBERT K. RESSLER was assigned to the Cleveland Division of the Federal Bureau of Investigation and Special Agent PHILLIP R. KERBY was assigned to Columbus Resident Agency, Cincinnati, Ohio Division of the Federal Bureau of Investigation.

7. On May 17, 1975, Special Agent PHILLIP R. KERBY advised Affiant A that he, Special Agent KERBY, had been in contact with confidential source number one and that according to confidential source number one HARVEY HORWITZ, the aforementioned employee of Sovereign News Company, would be bringing a shipment of obscene magazines and films to Columbus, Ohio on May 20, 1974. Special Agent KERBY advised Affiant A that according to confidential source number one HORWITZ would be driving a white truck, current Ohio license 5H393.

8. On May 20, 1974, Special Agents of the Federal Bureau of Investigation com-

menced a physical surveillance of 4516 Birchwold Road, South Euclid, Ohio the known residence of HARVEY HORWITZ. HORWITZ was observed to leave his residence carrying a clothes bag and a suitcase. HORWITZ placed both of these items in the trunk of a beige Plymouth, current Ohio license PP5725. Ohio license PP5725 was registered to FRED HIRSCH, known to Affiant A as also being employed by the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio. HORWITZ entered the Plymouth vehicle bearing license PP5725 driven by an unknown white male and thereafter proceeded to the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio. At Sovereign News Company, HORWITZ exited the vehicle and was observed to enter Sovereign News Company carrying his suitcase and clothes bag. Shortly thereafter, a white Dodge

truck bearing current Ohio license 5H393 being driven by HORWITZ exited the warehouse section of Sovereign News Company. Shortly thereafter, HORWITZ, accompanied by a white male, whose identity at the time was unknown, was observed continuously driving the truck via Interstate 71 to Columbus, Ohio. The individual accompanying HORWITZ was subsequently identified as JOHN BLANKENSHIP, an employee of Sovereign News Company,

9. A physical surveillance by Affiant A and other Special Agents of the Federal Bureau of Investigation on May 20, 1974 of the white Dodge truck 5H393 was continued during its travel in the Columbus, Ohio area. HORWITZ and BLANKENSHIP were observed to park this vehicle adjacent to numerous adult bookstores in Columbus, Ohio. HORWITZ and BLANKENSHIP were observed to carry several boxes from the

truck into these bookstores. The truck was surveilled continuously on May 20, 1974 and was observed to travel in the early evening hours to Dayton, Ohio where HORWITZ and BLANKENSHIP were observed to deliver cartons from the truck to several adult bookstores in that city. Affiant A further states that according to information subsequently provided by Special Agents of the Cincinnati and Indianapolis Divisions of the Federal Bureau of Investigation, HORWITZ and BLANKENSHIP spent the night of May 20-21, 1974 in the Dayton, Ohio area at the Holiday Inn located at the junction of West 1st Street and Interstate 75. The truck was placed under surveillance on the morning of May 21, 1974 where the occupants of the vehicle were observed to supply two additional adult bookstores in the Dayton, Ohio area. The truck was surveilled continually from

Dayton, Ohio to Norwood, Ohio, Cincinnati, Ohio and on to Indianapolis, Indiana. At Indianapolis, Indiana the truck was observed to stop at other adult bookstores and HORWITZ and BLANKENSHIP were observed unloading cartons at these locations. The bookstores at which the truck stopped and made deliveries in the Indianapolis area were the Trans Media Bookstore, 3212 East Michigan, Indianapolis, Indiana, Town and Contry Adult Books, 4457 North Keystone, Indianapolis, Indiana and Harem Bookstore, 2206 North Meridian, Indianapolis, Indiana.

10. On May 22, 1974, confidential source number one provided Special Agent PHILLIP R. KERBY with copies of the following materials which confidential source number one advised had been delivered to the Mid-America Bookstore, 14 East Town Street, Columbus, Ohio by HORWITZ and BLANKENSHIP on May 20, 1974:

One eight millimeter film entitled "Naughty Lady",

One eight millimeter film entitled "Centurions",

One eight millimeter film entitled "Fantasy Four",

One eight millimeter film entitled "Blue Movie", #11,

One magazine entitled "Private",

One magazine entitled "New Sex Trends", #6,

One magazine entitled "Love Machines Annual",

One magazine entitled "Full Swing #7, A study of Group Sex",

One newspaper entitled "Screw"

11. Pursuant to Affiant A's instructions on May 24, 1974, Special Agent BENEDICT B. CRUISE, Indianapolis, Division of the Federal Bureau of Investigation, entered the Harem Bookstore, 2208 North Meridian, Indianapolis, Indiana and purchased a magazine entitled "Love Machines Annual." On the same date, Special Agent JAMES G. WINTERS, also assigned to the Indianapolis Division of

the Federal Bureau of Investigation, entered the Town and Country Adult Books, 4457 North Keystone, Indianapolis, Indiana and purchased a magazine entitled "New Sex Trends", #6. Also on the same date, Special Agent JAMES G. WINTERS entered the Trans Media Bookstore, 3212 East Michigan Street, Indianapolis, Indiana and purchased a magazine entitled "Full Swing #7, A Study of Group Sex."

12. The materials supplied to Special Agent KERBY by confidential source number one were shipped by Special Agent KERBY to Affiant A for examination and identification purposes. Affiant A herein states that the magazines purchased by Special Agents WINTERS and CRUISE from the aforementioned adult bookstores in paragraph 11 were also shipped to affiant A for purposes of examination and indentification (sic).

13. Upon receipt of the material mentioned in paragraphs 10 and 11, Affiant A compared the content of the magazines and describes the magazines as follows: "New Sex Trends" #6 is a 68 page magazine containing photographs in black and white and color vividly portraying obscene sexual activity between males and females. This sexual activity depicts sexual intercourse and includes the penetration of a male penis into the vagina of a female and in addition depicts acts of fellatio, cunnilingus, anal sexual intercourse, stimulation with an artificial phallus or dildo and scenes of male ejaculation. "Full Swing #7, A Study of Group Sex" is a 68 page magazine of black and white and color photographs vividly portraying sexual activity between males and females. The sexual activity depicts acts of fellatio, cunnilingus, anal intercourse and ejaculation. "Love Machines Annual"

is a 120 page magazine containing black and white and color photographs of males. The photos depict nude and partially nude males engaged in homosexual activity.

14. On June 14, 1974, the magazines "New Sex Trends, #6; "Love Machines Annual" and "Full Swing #7, A Study of Group Sex", which were provided by confidential source number one, along with the magazines purchased by Special Agents JAMES G. WINTERS and BENEDICT B. CRUISE in Indianapolis, Indiana, were transmitted to the FBI Laboratory, Washington, D.C. for purposes of analysis. On July 5, 1974, the FBI Laboratory advised that a laboratory comparison of the magazines provided by confidential source number one and those which were purchased in Indianapolis, Indiana, by Special Agents of the Federal Bureau of Investigation, revealed that these magazines were identical copies prepared on the same plates.

15. On January 17, 1975, Affiant A was contacted by Special Agent FREDERICK R. DAULTON, Fort Worth, Texas, Resident Agency, Dallas Division of the Federal Bureau of Investigation and advised by Special Agent DAULTON that he, DAULTON, had developed information from a confidential source, hereinafter referred to as confidential source number two, that Sovereign News Comapny, 2075 East 65th Street, Cleveland, Ohio, was shipping obscene material from Cleveland, Ohio, to Forth Worth, Texas, by utilizing the facilities of the United Parcel Service, an interstate carrier. Special Agent DAULTON advised Affiant A that confidential source number two had furnished reliable information in the past which had been corroborated through independent investigation. Special Agent DAULTON advised that according to confidential source number two a shipment of obscene magazines

had been sent via United Parcel Service from the Sovereign News Company, Cleveland, Ohio, on October 24, 1974, to Webster's Adult Bookstore, 3522 Hemphill, Forth Worth, Texas. The interstate shipment was a C.O.D. shipment in the amount of $90.45. Special Agent FREDERICK R. DAULTON further advised Affiant A, that according to confidential source number two, a second shipment of obscene matter was received via United Parcel Service from the Sovereign News Company at Webster's Adult Bookstore, 3522 Hemphill, Forth Worth, Texas, on November 12, 1974. This was also a C.O.D. shipment in the amount of $174.56.

16. Special Agent FREDERICK DAULTON advised Affiant A that he observed check number 148 drawn on the Tarrant State Bank, Fort Worth, Texas dated October 29, 1974, paid to the order of Sovereign News Company in the amount of $90.45. This

check was drawn on the Tarrant State Bank account number 193-644-2. Special Agent DAULTON further advised that he observed check number 165 also drawn on the Tarrant State Bank, account number 193-644-2, dated November 12, 1974, was payable to Sovereign News Company in the amount of $174.56. In addition, Special Agent DAULTON advised Affiant A that he received from confidential source number two a copy of a magazine entitled "Prince", #9 and a copy of "Casebook, Volume 1, #3, Photographs of Unusual Sex Practices". Special Agent DAULTON advised Affiant A that confidential source number two stated to him that both of these magazines were contained in the October 24, 1974 shipment sent from the Sovereign News Company, Cleveland, Ohio via United Parcel Service and received at Webster's Adult Bookstore on October 29, 1974.

17. On February 6, 1975, Special Agent DAULTON telephonically advised Affiant A that he shipped the magazines entitled "Prince", #9 and "Casebook", described in paragraph 16 to Affiant A. These magazines were subsequently received by Affiant A and upon examination by Affiant A it was determined that these magazines contained black and white and color photographs of obscene sexual activity. This sexual activity vividly portrayed acts of fellatio, cunnilingus and ejaculation to include the insertion of a male penis into the mouth and vagina of a female.

18. On January 30, 1975, Affiant A reviewed the records of United Parcel Service in Cleveland, Ohio. These records were reviewed in the presence of WILLIAM A. SCHULTZ, District Loss Prevention Manager, Northern Ohio District, United Parcel Service. SCHULTZ advised Affiant A that United Parcel Service account number 4-84-909 was assigned by United

Parcel Service to the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio. SCHULTZ advised that a United Parcel Service driver was assigned to pick up packages at that location once a day, Monday through Friday. The pick-up record of 436-736-15 dated October 24, 1974 for account number 4-84-909 was reviewed by Affiant A and it was revealed that according to this record one package weighing 22 pounds was shipped from Sovereign News Company, 2075 East 65th Street to Webster's Adult Bookstore, 3522 Hemphill, Forth Worth, Texas, 76110. The package was shipped C.O.D. at a cost of $90.45. The United Parcel Service pick-up record number 436-736-27 dated October 29, 1974 for account number 4-84-909 was also reviewed and this record confirmed that a package weighing 34 pounds was shipped from the Sovereign News Company, 2075 East 65th Street on October

29, 1974 to Webster's Adult Bookstore, 3522 Hemphill, Forth Worth, Texas. This was a C.O.D. transaction in the amount of $174. 56.

19. On February 13, 1975, Special Agent FREDERICK R. DAULTON advised Affiant A that according to information from confidential source number two, confidential source number two had telephonically contacted SAM JOSEPH at the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio by telephoning number 216-391-3452 on February 12, 1975. According to published records of the Ohio Bell Telephone Company, telephone number 216-391-3452 is a published listing to the Sovereign News Company at 2075 East 65th Street, Cleveland, Ohio. Special Agent DAULTON advised that according to instructions from SAM JOSEPH to confidential source number two, JOSEPH would ship eight each eight millimeter films to confidential source number two,

pending receipt of payment by JOSEPH in the amount of $70.50. On February 13, 1975, Special Agent DAULTON further advised Affiant A that he had observed confidential source number two obtain a cashiers check number 102809 drawn on the Seminary State Bank, 116 East Seminary Drive, Forth Worth, Texas in the amount of $70.50. Special Agent DAULTON advised that he observed the source place this check in an envelope addressed to Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio, attention SAM JOSEPH and deposit it in a mailbox.

20. On February 20, 1975, Affiant A was advised by Special Agent FREDERICK R. DAULTON that he received from confidential source number two a package which confidential source number two had received in the mail on February 20, 1975. The package, when received from confidential source number two, was unopened and

was opened by Special Agent DAULTON in the presence of confidential source number two. The contents of the package were observed to be eight each eight millimeter color films. Special Agent DAULTON advised Affiant A that he had reviewed all of these films and determined that all depicted explicit scenes of sexual intercourse between males and females to include fellatio, cunnilingus and ejaculation. Special Agent DAULTON advised that subsequent to reviewing these films he sealed each of the reels with evidence tape and placed his initials "FRD" on each strip of tape. Affiant A states that he instructed Special Agent DAULTON to enclose the aforementioned films in the original package, rewrap the package and transmit same to Affiant A.

21. On February 24, 1975, Affiant A received the aforementioned package from Special Agent FREDERICK R. DAULTON. On February 25, 1975, this package was opened

at the office of the Federal Bureau of Investigation, Cleveland, Ohio. After removing the outer transmittal wrapper the inner cardboard box contained the eight boxes of films described in paragraph 20. An address label affixed to the box indicated that the box was sent to Webster's Bookstore, 3522 Hemphill, Fort Worth, Texas and bore a return address listed as Cresent Plastics, 1980 East 55th Street, Cleveland, Ohio 44103. Affiant A further states that a Pitney-Bowes postal meter sticker in the upper right hand corner of the package indicated that the package was deposited into the United States mail on February 18, 1975 through Pitney-Bowes meter 179298 in the amount of $3.04. Contained within the box were eight smaller individual boxes each containing a reel of eight millimeter film. The titles as listed on these individual boxes are as follows:

Lasse Braun presents Parisiana,
"Tour Eiffel", LB 37;

Lasse Braun presents Parisiana,
"Grand Prix", LB 38;

Shocking, by Lasse Braun,
"Cake Orgy", LB 40;

Shocking, by Lasse Brau,
"Funny Priest", LB 41;

Shocking, by Lasse Braun,
"Psycho Doll", LB 42;

Pretty Girl Pictures presents,
"Hot Sucker", PG 21;

Esquire Finest Quality Film
Productions;

"Pretty Girl", #25

Affiant A reviewed the above listed films and found that all these films depicted obscene acts of sexual intercourse between males and females with vivid displays of fellatio, cunnilingus, analingus, masturbation and ejaculation. All of the films vividly depict actual contact and peentration of the male penis into the female vagina. Upon examination of the films described in paragraph 21,

Affiant A found numerous markings and indications that certain of the aforementioned films were imported into the United States.

22. On February 21, 1975, Affiant B inspected the serial numbers of the Pitney-Bowes meters located at Postal Substation B, 1650 East 55th Street, Cleveland, Ohio. Affiant B states that Pitney-Bowes meter number 179298 is physically located at Postal Substation B, 1650 East 55th Street, Cleveland, Ohio.

23. On February 21, 1975, Affiant A conducted an investigation to determine the nature of the business known as Cresent Plastics, 1980 East 55th Street, Cleveland, Ohio. The investigation revealed this address to be the location of the El Madrigal Bar. According to published listings of the Greater Cleveland Area Credit Bureau no listing exists

for Cresent Plastics. Further attempts by Affiant A to determine the existence of Cresent Plastics in the greater Cleveland area met with negative results. Based upon the past investigative experience of Affiants A and B, the utilization of fictitious or incorrect return addresses on packages sent by a wholesaler or distributor of obscene material, is a common practice utilized by said wholesaler or distributor to prevent identification of the location of their shipping or distribution center.

24. On February 20, 1975, Special Agent FREDERICK R. DAULTON, Fort Worth, Texas advised Affiant A that according to information developed from confidential source number two, this source had telephonically contacted SAM JOSEPH through telephone number 216-391-3452 on February 20, 1975. Special Agent DAULTON further advised Affiant A that according to instructions from SAM JOSEPH to confiden-

tial source number two, JOSEPH would ship a non-specified quantity of magazines, believed to be approximately 40 and three eight millimeter films to confidential source number two pending receipt of payment by JOSEPH in the amount of $130. On February 21, 1975, Special Agent DAULTON advised Affiant A that he had observed confidential source number two obtain a cashiers check number 102995 drawn on the Seminary State Bank, 116 East Seminary Drive, Fort Worth, Texas in the amount of $130. Special Agent DAULTON advised that he observed the source place this check in an envelope addressed to Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio attention SAM JOSEPH and deposit it in a mailbox.

25. On February 28, 1975, Affiant A was advised by Special Agent FREDERICK R. DAULTON, Fort Worth, Texas that DAULTON had received from confidential source

number two another package shipped from Sovereign News Company that had been delivered to confidential source number two via the United States Postal Service. Special Agent DAULTON advised that he had received the package from confidential source number two unopened and that Special Agent DAULTON had opened the package in the presence of confidential source number two. Special Agent DAULTON advised Affiant A that the package contained three eight millimeter films, 27 magazines and 10 paperback books. Special Agent DAULTON further advised Affiant A that he had reviewed each of the magazines and stated that all of the 27 magazines depicted various sexual activities between males and females including acts of sexual intercourse, cunnilingus, fellatio and masturbation.

26. On March 4, 1975, Special Agent FREDERICK R. DAULTON shipped the aforementioned items directly to Affiant A at

the Federal Bureau of Investigation, Cleveland, Ohio.

27. On March 4, 1975, Affiant A received the package described in paragraph number 25. The package bore an address labeled Webster's Bookstore, 3522 Hemphill, Fort Worth, Texas, with a return address of Prospect Sign Company, 2167 East 55th Street, Cleveland, Ohio. In the upper right hand corner of the box was observed Pitney-Bowes meter sticker number 121098, post marked Cleveland, Ohio, February 25, 1975 in the amount of $9.56. This package contained 19 magazines and three boxes of eight millimeter films, one reel per box and three paperback novels. The titles of the magazines as contained in the shipment are as follows:

"Eroticon", #1;

"Eroticon", #2;

"Sexploration", Volume 1;

"Sexploration", Volume 2;

"Sense", Volume 3, #3;

"Sense", Volume 2, #6;

"Sucking";

"Sex Act";

"Sexual Arousal - Oral Sex";

"Fucking Trios";

"Pleasure", Book 1;

"The Sex Family";

"Sexscope";

"Answers";

"Positions and Techniques";

"Sex in Marriage";

"Hot Cunts";

"Response";

"Sucking and Fucking".

The titles of the paperback novels are as follows:

"Oral Tunnel of Love";

"Bottoms-Up-Sisters";

"Mother-Son Incest".

The titles of the eight millimeter films are as follows:

Tropical, by Lasse Braun
"Paradise", LB 31;

Tropical, by Lasse Braun
"Limbo, LB 32;

Tropical, by Lasse Braun
"White Fantasies", LB 33.

28. On March 5, 1975, Affiant A reviewed the above magazines and films and found they all depicted explicit obscene acts of sexual intercourse, fallatio (sic), cunnilingus, analingus, ejaculation and masturbation.

29. On February 28, 1975 Affiant B physically inspected the serial numbers of the Pitney-Bowes meter located at Postal Substation B, 1650 East 55th Street. Affiant B further states that Pitney-Bowes meter number 121098 is physically located at that Postal substation.

30. Investigative attempts by Affiant A to locate the address of 2167 East 55th Street have proven negative. Examination of the Published Records of the Greater Cleveland Area Credit Bureau revealed no

listing for a Prospect Sign Company.

31. On March 3, 1975, Special Agent FREDERICK R. DAULTON, Fort Worth, Texas, advised Affiant A that according to information developed from confidential source number two, this source had telephonically contacted SAM JOSEPH through telephone number (216) 391-3452 on March 3, 1975. Special Agent DAULTON further advised that according to instructions from SAM JOSEPH to confidential source number two, JOSEPH would ship, via the United Parcel Service, approximately 40 to 50 magazines to confidential source number two. Special Agent DAULTON further advised that according to confidential source number two SAM JOSEPH advised this source that this would be a C.O.D. shipment.

32. On March 4, 1975, Affiant A, was advised by Special Agent RICHARD C. ARTIN, an Agent of the Cleveland Office of the Federal Bureau of Investigation that

Special Agent ARTIN had conducted a surveillance of a truck belonging to the United States Parcel Service, being further identified as truck number 40356 with current Ohio license 8H1051. Special Agent ARTIN advised Affiant A that this truck was observed to back into the warehouse dock at Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio at 4:52 PM and exit the warehouse at 4:58 PM.

33. On March 4, 1975, Affiant A contacted WILLIAM A. SCHULTZ, United Parcel Service, who advised that truck number 40356, driven by AL HARRIS had been responsible for making daily pick ups at Sovereign News Company, 2075 East 65th Street, Cleveland. SCHULTZ furnished Affiant A with a copy of pickup record number 60482674 which record is of account number 4-84-909 dated March 4, 1975. An entry on the pickup record indicates that a package was picked up

by the driver of truck number 40356 at Sovereign News Company, 2075 East 65th Street on March 4, 1975. The package was to be shipped via United Parcel Service to Webster's Bookstore, 2500 Hemphill, Fort Worth, Texas, 76110, C.O.D. in the amount of $143.30. Affiant A states that immediately following review of this pick up record SCHULTZ provided Affiant A with a package that SCHULTZ advised had been removed from truck number 40356 moments before. The package bore a label addressed to Webster's Bookstore, 2500 Hemphill, Forth Worth, Texas and was steel banded. Affiant A placed the initials "GEG" and the date March 4, 1975 in three placed on this package and immediately returned it to SCHULTZ.

34. On March 20, 1975, Affiant A was contacted by Special Agent FREDERICK R. DAULTON, Fort Worth, Texas, who advised

him that he had accompanied confidential source number two to the United Parcel Service Office, 520 East Lancaster Avenue, Fort Worth, Texas on March 10, 1975. Special Agent DAULTON advised that he observed confidential source number two accept a package addressed to Webster's Bookstore, 2500 Hemphill, Fort Worth, Texas 76110. Special Agent DAULTON advised that the source paid $143.30 to United Parcel Service for this package. Special Agent DAULTON further advised Affiant A that he retrieved this package unopened immediately from confidential source number two, transported it to the office of the Fort Worth Resident Agency where it was opened and inventoried. Special Agent DAULTON advised that on the outside of the box were the initials "GEG" March 4, 1975 and the package was steel banded. Special Agent DAULTON advised

Affiant A that he inventoried the contents of the box which he stated amount to 54 magazines, all of which contained black and white and color photographs depicting various forms of obscene sexual activity, to include sexual intercourse, fellatio and cunnilingus. Also contained in the box was one copy of bill of lading, invoice number 16704 from Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio on which the contents of the package are listed. Special Agent DAULTON advised Affiant A that he placed the magazines back into the original box, rewrapped the box and transmitted the entire contents to Affiant A in Cleveland, Ohio.

35. On March 10, 1975, Affiant A received the above package described in paragraph 31 above and after removing the outer transmittal wrapper, observed that the outside of the original carton had

been shipped from Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio to Webster's Bookstore, 2500 Hemphill, Fort Worth, Texas, 76110. Affiant A states that he observed the initials "GEG" March 4, 1975 on the outside of this box and that this is the same box that he observed while under the custody and control of the United Parcel Service on March 4, 1975. The contents of the box were inventoried and the following titles of magazines were found therein:

"Sucking and Fucking" two copies;

"Hot Cunts" two copies;

"Oral Love", #215 two copies;

"Image", #216 two copies;

"Eze Time", #217 two copies;

"Sex Tech" two copies;

"Sucking" two copies;

"Fucking Trios" two copies;

"Fun-Love Nympho" two copies;

"Sex Act", Book 1;

"Sex Act", Book 2;

"Fucking Couples", Volume 1, #1;

"Eroticon", Book 1;

"Eroticon", Book 2;

"Nique", Book 1;

"Children of Love", Volume 1, #1;

"Sexual Arousal: Oral Sex";

"Positions and Techniques";

"Sexploration", Volume 2;

"Pleasure", Book 1;

"Sucking Sisters", Volume 1, #1;

"The Superstars of Porno";

"Rear Entry", Volume 1;

"Loving-Fucking", Volume 1;

"The Sex Family";

"Foreplay";

"Casebook", Volume 2, #6;

"Answers", Volume 3, #1;

"Answers", Volume 3, #2;

"Answers", Volume 3, #3;

"Answers", Volume 3, #4;

"Response", Volume 1, #4;

"Response", Volume,3, #1;

"Response", Volume 3, #4;

"Sense", Volume 3, #3;

"Sense", Volume 3, #4;

"Sex in Marriage", Volume 3, #1;

"Sex in Marriage", Volume 3, #2;

"Sex in Marriage", Volume 3, #3;

"Sexscope", Volume 2, #5;

"Sexscope", Volume 2, #6;

"Sexscope", Volume 3, #1;

"Sexscope", Volume 3, #2;

"Sexscope", Volume 3, #3;

"Sexscope", Volume 3, #4;

Affiant A states that the above magazines were reviewed by him and that they are described as magazines containing black and white and color photographs vividly portraying obscene acts of sexual activity including acts of fellatio and cunnilingus. Numerous photographs are observed to show actual penetration of a male penis into

the vagina and the mouth of a female. Other scenes vividly portray oral-vaginal contact and male ejacuation on the stomach of an into the mouth of various females. Affiant A further states that contained within the box was a copy of invoice number 16704 from the Sovereign News Company.

36. Based upon the information set forth in this affidavit, Affiants A and B have reason to believe and do believe that on the premises known as the Sovereign News Company, located at 2075 East 65th Street, Cleveland, Ohio there are located therein copies of obscene, lewd, lascivious, and filthy magazines and films which have been mentioned and described in this affidavit. Said obscene, lascivous, lewd and filthy magazines having been imported into the United States in violation of Title 18, United

States Code, Section 1462. In addition, upon the premises of the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio there are located therein copies of obscene, lascivious, lewd and filthy magazines and films which have been and continue to be mailed and delivered via the United States Postal Service in violation of Title 18, United States Code, Section 1461. Further, there are located upon the premises known as the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio copies of obscene, lewd, lascivious, and filthy magazines and films which have been and continue to be transported in interstate commerce in violation of Title 18, United States Code, Section 1465. In addition, Affiants A and B have reasons to believe and do believe that records, notations, receipts, bills of lading, billing invoices, and

other documents evidence of the above described illegal importation, mailing, and interstate shipment of obscene, lascivious, lewd, and filthy materials are located at the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio.

37. Affiant A states that 2075 East 65th Street, Cleveland, Ohio is further described as a two story brick building located on the east side of East 65th Street adjacent to and immediately north of Carnegie Avenue, Cleveland. Above the entrance to 2075 East 65th Street is a white sign with black lettering stating Sovereign News Company.

38. Affiant A states that on March 14, 1975, copies of the aforementioned magazines and films were presented to United States Magistrate HERBERT T. MAHER for his evaluation. Further Affiant sayeth not.

/s/George E. Grotz
GEORGE E. GROTZ
Special Agent
Federal Bureau of
Investigation

/s/Ronald E. Barakowski
RONALD E. BARAKOWSKI
Postal Inspector
United States Postal
Service

Subjects are sworn to me this 18th day of March, 1975.

/s/ Herbert T. Maher
HERBERT T. MAHER
United States Magistrate

UNITED STATES DISTRICT COURT
FOR THE

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA	)	Docket No.
	)	
	)	Case No.
vs.	)	
	)	
Sovereign News Company 2075 East 65th Street Cleveland, Ohio	)))	SEARCH WARRANT

To any Agent of the Federal Bureau of Investigation or any Postal Inspector

Affidavit(s) having been made before me by Special Agent GEORGE E. GROTZ that he has reason to believe that on the premises known as Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio

in the Northern District of Ohio there is now being concealed certain property, namely obscene, lewd, lascivious and filthy magazines and motion picture films, included, but not limited to, the itmes listed in Exhibit A attached to this search warrant, and records, receipts,

notations, bills of lading, journals, ledgers, billing invoices, inventories, and other documents reflecting the importation receipt and shipment of the aforementioned obscene material in interstate commerce or by the U.S. Postal Service. Seizure of the magazines and motion picture films and other magazines and movies of the same kind and nature is to be limited to three (3) evidentiary copies

> to also include documents reflecting the corporate structure of Sovereign News Company and any of its affiliate companies.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of ten days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search in the daytime (6:00 a.m. to 10:00 p.m. and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before /s/Herbert T. Maher
Federal judge or magistrate
as required by law.

Dated this 25th day of March, 1975

/s/Herbert T. Maher
Judge (Federal or State Court of Record) or Federal Magistrate

EXHIBIT A

The titles of the eight millimeter movies observed in plain view are as follows:

"Dominate Trio, Part A" BI-101A
"Dominate Trio, Part B" BI-101B
"Bizarre Bondage" BI-102
"Bound to Please," BI-103
"Drenched and Spanked," BI-104
"Trained and Transformed" BI-105
"The Honeymoon"
"Naughty Nurses"
"Make Me Please"
"Lovers"
"Suckables"
"Sweet Meat"
"L. Love Lace"
"Prison Playmates"
Super Core film number 1, special edition
Super Core film number 3
Super Core film number 4
Super Core film number 5
Super Core film number 6
Super Core film number 7
Oz films presents Motorcycle Mama's
Oz films presents Capture Flesh
Oz films presents Big Black Jack
Oz films presents Lesbian Nurses
Pretty Girl films presents the Man and the Boat
Pretty Girl films presents Horse Play
Pretty Girl films number 24, Pool Party
Pretty Girl presents number 22, the Car Caper
Erotica Unlimited, eight millimeter film from Scandinavia, number 1
Erotica Unlimited, eight millimeter film from Scandinavia, number 2
Erotica Unlimited, eight millimeter film from Scandinavia, number 4

Erotica Unlimited, eight millimeter
film from Scandinavia, Number 7
Erotica Unlimited, eight millimeter
film from Scandinavia number 8
Erotica Unlimited, eight millimeter
film from Scandinavia, Number 9
Erotica Unlimited, eight millimeter
film from Scandinavia number 12
Erotica Unlimited, eight millimeter
film from Scandinavia, number 13
Erotica Unlimited, eight millimeter
film from Scandinavia number 14
Erotica Unlimited, eight millimeter
film from Scandinavia, number 15
Erotica Unlimited, eight millimeter
film from Scandinavia number 16
Danska, Sex in Danska Color
Flesh Films number 2, Sex for Dessert
Flesh Films, Her Majesty
Flesh Films, number 4, Brother and Sis
Flesh Films number 3, Robin Breast
Pretty Girl Films, French Maid number 27
Pretty Girl number 28, Cher and
Cher Alike
Lasse Braun Depraved Series,
The Maniac LB 36
Lasse Braun Depraved Series,
The Debs LB 35
Lasse Braun, The Countess LB 34
Pretty Girl Films number 29,
Pretty Girl of the Year
Pretty Girl Films number 30,
Strip Poker
Pretty Girl Films Number 31,
Ice Cream Sandwich
Porno Mondo Number 1
Bizarre Film, Rape of the Hitchhiker,
Part I
Bizarre Film, Rape of the Hitchhiker,
Part II
Bizarre Film, Mother and Daughter
Rape, Part I
Bizarre Film, Mother and Daughter
Rape, Part II

Bizarre Films, Rape of the Waitress, Part I
Bizarre Films, Rape of the Waitress, Part II
Peep Films, number 1
Peep Films, number 2
Peep Films, number 3
Peep Films, number 4
Peep Films, number 5
Scandinavia Films, Fill All Holes
Scandinavia Films, Cockpit
Scandinavia Films, Double Header
Scandinavia Films, Fuck Me Tender
Scandinavia Films, There She Blows

The boxes of the following eight millimeter films were untitled; however, they are identified by the Stock Number located on the exterior of the boxes.

CC-87
CC-86
CC-88
CC-62
CC-55
CC-64
CC-71
CC-72
CC-70
CC-76

The titles of the magazines observed in plain view are as follows:

"Sexpo", No. 211
"Cherry," No. 212
"Pussycat," No. 213
"Stud Service," Volume 1
"Con Amore"
"Trick n Treat"

"Three Way Fuck"
"Ballin"
"Stiff," Volume 1, No. 1
"Finger Lickin Good"
"Young Lust"
"Desire"
"Succotash," Volume 1, No. 1

UNITED STATES DISTRICT COURT
FOR THE

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA	)	Docket No.____
	)	
	)	Case No.____
vs.	)	
	)	
Sovereign News Company 2075 East 65th Street Cleveland, Ohio	)))	AFFIDAVIT FOR SEARCH WARRANT

BEFORE HERBERT T. MAHER Cleveland, Ohio

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio

in the Northern District of Ohio there is now being concealed certain property, namely obscene, lewd, lascivious, and filthy magazines and motion picture films, specifically listed, but not

limited to items further described in Exhibit A attached to this affidavit, and records notations, bills of lading, punch tapes, journals, computer tapes, ledgers, letters, billing invoices, inventories, and other documents reflecting the importation, receipt and/or shipment of the aforementioned obscene material in interstate commerce or by the U.S. Postal Service. Seizure of the specifically listed obscene, lewd, lascivous and filthy magazines and motion picture films is to be limited to three (3) evidentiary copies, which are evidence of violation of Title 18, United States Code, Sections 1461, 1462, and 1465.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:
See attached affidavit: Exhibit B

/s/Goerge E. Grotz
GEORGE E. GROTZ Signature of Affiant

Special Agent, FBI Official Title, if any

Sworn to before me, and subscribed in my presence, March 25, 1975.

/s/Herbert T. Maher
HERBERT T. MAHER
Judge or Federal
Magistrate

EXHIBIT A

The titles of the eight millimeter movies observed in plain view are as follows:

"Dominate Trio, Part A" BI-101A
"Dominate Trio, Part B" BI-101B
"Bizarre Bondage" BI-102
"Bound to Please," BI-103
"Drenched and Spanked," BI-104
Trained and Transformed" BI-105
"The Honeymoon"
"Naughty Nurses"
"Make Me Please"
"Lovers"
"Suckables"
"Sweet Meat"
"L. Love Lace"
"Prison Playmates"
Super Core film number 1, special edition
Super Core film number 3
Super Core film number 4
Super Core film number 5
Super Core film number 6
Super Core film number 7
Oz films presents Motorcycle Mama's
Oz films presents Capture Flesh
Oz films presents Big Black Jack
Oz films presents Lesbian Nurses
Pretty Girl films presents the Man and the Boat
Pretty Girl films presents Horse Play
Pretty Girl films number 24, Pool Party
Pretty Girl presents number 22, the Car Caper
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Erotica Unlimited, eight millimeter film from Scandinavia, number 2
Erotica Unlimited, eight millimeter film from Scandinavia, number 4

Erotica Unlimited, eight millimeter
film from Scandinavia, Number 7
Erotica Unlimited, eight millimeter
film from Scandinavia number 8
Erotica Unlimited, eight millimeter
film from Scandinavia, Number 9
Erotica Unlimited, eight millimeter
film from Scandinavia number 12
Erotica Unlimited, eight millimeter
film from Scandinavia, number 13
Erotica Unlimited, eight millimeter
film from Scandinavia number 14
Erotica Unlimited, eight millimeter
film from Scandinavia, number 15
Erotica Unlimited, eight millimeter
film from Scandinavia, number 16
Danska, Sex in Danska Color
Flesh Films number 2, Sex for Dessert
Flesh Films, Her Majesty
Flesh Films, number 4, Brother and Sis
Flesh Films number 3, Robin Breast
Pretty Girl Films, French Maid number 27
Pretty Girl number 28, Cher and
Cher Alike
Lasse Braun Depraved Series,
The Maniac LB 36
Lasse Braun Depraved Series,
The Debs LB 35
Lasse Braun, The Countess LB 34
Pretty Girl Films number 29,
Pretty Girl of the Year
Pretty Girl Films number 30, Strip Poker
Pretty Girl Films Number 31,
Ice Cream Sandwich
Porno Mondo Number 1
Bizarre Film, Rape of the Hitchhiker,
Part I
Bizarre Film, Rape of the Hitchhiker,
Part II
Bizarre Film, Mother and Daughter Rape,
Part I
Bizarre Film, Mother and Daughter Rape,
Part II

Bizarre Films, Rape of the Waitress, Part I
Bizarre Films, Rape of the Waitress, Part II
Peep Films, number 1
Peep Films, number 2
Peep Films, number 3
Peep Films, number 4
Peep Films, number 5
Scandinavia Films, Fill All Holes
Scandinavia Films, Cockpit
Scandinavia Films, Double Header
Scandinavia Films, Fuck Me Tender
Scandinavia Films, There She Blows

The boxes of the following eight millimeter films were untitled; they are identified by the Stock Number located on the exterior of the boxes.

CC-87
CC-86
CC-88
CC-62
CC-55
CC-64
CC-71
CC-72
CC-70
CC-76

The titles of the magazines observed in plain view are as follows:

"Sexpo", No. 211
"Cherry," No. 212
"Pussycat," No. 213
"Stud Service," Volume 1
"Con Amore"
"Trick n Treat"
"Three Way Fuck"
"Ballin"

"Stiff," Volume 1, No. 1
"Finger Lickin Good"
"Young Lust"
"Desire"
"Succotash," Volume 1, No. 1

A F F I D A V I T

1. I, GEORGE E. GROTZ, am employed as a Special Agent of the Federal Bureau of Investigation and have continually held that position for the past three and a half years. The affiant has conducted investigations of the interstate transportation of obscene matter in the Northern District of Ohio since December, 1973, and has supervised an investigation involving the interstate transportation of obscene matter by the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio, since December, 1973. In accordance with this assignment, I have received the reports of investigations conducted by other Special Agents of the Federal Bureau of Investigation and have had this information available for my utilization in this investigation. The affiant has read this affidavit and is satisfied the information contained herein is accurate.

2. The affiant has reason to believe, and does believe, that the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio, is now committing and will continue to commit offenses against the United States in that the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio, has imported or has caused to be imported into the United States, obscene, lewd, lascivious and filthy material, in the form of magazines and motion picture films, in violation of Title 18, United States Code, Section 1462. In addition, the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio, has, and will continue to knowingly use, the United States Postal Service for the mailing, carriage and delivery of obscene, lewd, lascivious and filthy material in violation of Title 18, United States Code, Section 1461. Further, the affiant has reason to believe and does believe, that the Sovereign News

Company, 2075 East 65th Street, Cleveland, Ohio, has and will continue to knowingly transport in interstate commerce via the United Parcel Service, an interstate express company, or other common carrier, obscene, lewd, lascivious and filthy magazines and motion picture films for the purpose of sale and distribution, in violation of Title 18, United States Code, Section 1465.

3. On March 19, 1975, the affiant and other agents of the Federal Bureau of Investigation executed a Federal search warrant on the premises of the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio. Pursuant to that search warrant, numerous evidentiary copies of magazines and eight millimeter motion pictures which vividly portrayed obscene sexual acts were seized. The obscene sexual acts depicted but were not limited to, acts of cunnilingus, fellatio, ejaculation, masterbation and penetration of

the male penis into the vagina and mouth of a female.

In addition, numerous receipts, billing invoices, notations and other records reflecting the past and ongoing interstate transportation and/or importation of obscene material were also seized pursuant to the search warrant.

4. During the course of the execution of the search warrant on the premises of the Sovereign News Company on March 19, 1975, numerous other obscene magazines were observed in plain view, the covers of these magazines vividly depicted obscene sexual activites between males and females, males and males, females and females, including acts of fellatio, cunnillingus (sic), and ejaculation, of the same kind which were seized pursuant to the aforementioned search warrant. In addition, numerous boxes of eight millimeter films were observed in plain view, the covers

of which also depicted obscene sexual activities between males and females, males and males, females and females, which included obscene sexual acts of fellatio, cunnillingus (sic) and ejaculation and masterbation.

The titles of the obscene magazines observed in plain view are as follows:

"Sexpo", No. 211

"Cherry," No. 212

"Pussycat," No. 213

"Stud Service", Volume 1

"Con Amore"

"Trick' n Treat"

"Three Way Fuck"

"Ballin"

"Stiff," Volume 1, No. 1

"Finger Lickin Good"

"Young Lust"

"Desire"

"Succotash," Volume 1, No. 1

The titles of the eight millimeter movies observed in plain view are as follows:

"Dominate Trio, Part A" BI-101A
"Dominate Trio, Part B" BI-101B
"Bizarre Bondage" BI-102
"Bound to Please" BI-103
"Drenched and Spanked" BI-104
"Trained and Transformed" BI-105
"The Honeymoon"
"Naughty Nurses"
"Make Me Please"
"Lovers"
"Suckables"
"Sweet Meat"
"L. Love Lace"
"Prison Playmates"
Super Core film number 1, special edition
Super Core film number 3
Super Core Film number 4
Super Core Film number 5
Super Core Film number 6
Super Core Film number 7
Oz films presents Motorcycle Mama's
Oz films presents Capture Flesh
Oz films presents Big Black Jack
Oz films presents Lesbian Nurses
Pretty Girl films presents the Man and the Boat
Pretty Girl films presents Horse Play
Pretty Girl films number 24, Pool Party
Pretty Girl presnts number 22, the Car Caper
Erotica Unlimited, eight millimeter film from Scandinavia number 1
Erotica Unlimited, eight millimeter film from Scandinavia number 2
Erotica Unlimited, eight millimeter film from Scandinavia number 4
Erotica Unlimited, eight millimeter film from Scandinavia number 7

Erotica Unlimited, eight millimeter film from Scandinavia number 8
Erotica Unlimited, eight millimeter film from Scandinavia number 9
Erotica Unlimited, eight millimeter film from Scandinavia number 12
Erotica Unlimited, eight millimeter film from Scandinavia number 13
Erotica Unlimited, eight millimeter film from Scandinavia number 14
Erotica Unlimited, eight millimeter film from Scandinavia number 15
Erotica Unlimited, eight millimeter film from Scandinavia number 16
Danska, Sex in Danska Color
Flesh Films number 2, Sex for Dessert
Flesh Films, Her Majesty
Flesh Films, number 4, Brother and Sis
Flesh Films number 3, Robin Breast
Pretty Girl Films, French Maid number 27
Pretty Girl number 28, Cher and Cher Alike
Lasse Braun Depraved Series, The Maniac LB 36
Lasse Braun Depraved Series, The Debs LB 35
Lasse Braun, The Countess LB 34
Pretty Girl Films number 29, Pretty Girl of the Year
Pretty Girl Films Number 30, Strip Poker
Pretty Girl Films Number 31, Ice Cream Sandwich
Porno Mondo number 1
Bizarre Film, Rape of the Hitchhiker, Part I
Bizarre Film, Rape of the Hitchhiker, Part II
Bizarre Film, Mother and Daughter Rape, Part I
Bizarre Film, Mother and Daughter Rape, Part II

Bizarre Films, Rape of the Waitress, Part I
Bizarre Films, Rpae of the Waitress, Part II
Peep Films, number 1
Peep Films, number 2
Peep Films, number 3
Peep Films, number 4
Peep Films, number 5
Scandinavia Films, Fill all Holes
Scandinavia Films, Cockpit
Scandinavia Films, Double Header
Scandinavia Films, Fuck Me Tender
Scandinavia Films, There She Blows

The boxes of the following eight millimeter films were untitled; however, they are identified by the Stock Number located on the exterior of the boxes, and affiant has reason to believe they depict obscene acts of fellatio, cunnilingus, and ejaculation.

CC-87
CC-86
CC-88
CC-62
CC-55
CC-64
CC-71
CC-72
CC-70
CC-76

6. During the course of the execution of the Federal search warrant of March 19, 1975, on Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio, records, receipts (as noted in Paragraph three (3)), bills of lading, billing invoices, inventories, notations and other records reflecting the ongoing interstate shipments of obscene material, were observed by the affiant and other Agents of the Federal Bureau of Investigation. These records are set out as follows:

A. A typewritten list entitled as follows:

Agency Addresses and Telephone Numbers

Capitol News Co. 3400 North Kedzie Ave. Chicago, Illinois (312) 583-5500	AL BLOOM
Castle News Co. 4551 North 125th Street Butler, Wisconsin (414) 781-2350	PAULA BUBRICK
Crown News 1171 Chestnut Street Camden, New Jersey 08103 (609) 365-3011	STU WEISS

Imperial News Co.
35 Main Street
Depew, New York — FRANK POTWORA
(716) 684-6076

Majestic News Co.
922 West Fourth Avenue
Pittsburgh, Pa. 15233 — GREG KOCAN
(412) 231-5040
231-6660

New England News Co.
215 A Street
Boston, Mass 02210 — NEIL TRAYNOR
617-269-5266 (not on WATS line)

Noble News Co.
7803 Pulaski Highway — HERMAN WEISS
Baltimore, Maryland 21237
(301) 326-2100

Royal News Co.
30024 Beverly Road — RICHARD LITTLE
Romulus, Michigan
(313) 326-2100

Sundial News Co.
2650 West 2nd Avenue — JOE COULTER
Denver, Colorado 80219
(303) 934-5426
934-5427 (not on WATS line)

Discount News Co.
1975 East 65th Street — BERNIE WYMAN
Cleveland, Ohio
881-5877

B. Minutes of a meeting entitled "Decentralization of Headquarters Function", To Capital News Agency Company, dated

July 10, 1974, which discusses the reorganization of Capital News Agency.

C. Crown News check book, address 1171 Chestnut Street, Camden, New Jersey.

D. Invoices and deposit slips from New England News, 215 A Street, Boston, Massachusetts 02210 drawn on the First National Bank of Boston.

E. A merchandise return form number 00714 from Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio, returned to All American Distributing, 8431 Melrose Avenue, Los Angeles, California, indicating that they had mailed 905 magazine strips at a price of $1.25; 50 magazines strips at a cover price of $1.50 and 123 magazine strips with a cover price of $2.50.

F. Twenty-four hour bank receipts in the name of Imperial News Company, 35 Main Street, Depew, New York, account number 14043 listing deposits in this account

and the accounts for the following dates:

March 5, 1975	$2,656.06
March 6, 1975	$1,629.82
March 7, 1975	$2,213.61
March 8, 1975	$6,615.26
March 10, 1975	$1,851.41
March 11, 1975	$ 868.08
March 12, 1975	$ 972.77

G. A letter dated March 4, 1975, addressed to RON BRAVERMAN, The Lasse Braun Shop, Reguliersbreestraat 7, Amsterdam, Netherlands, in which the author of the letter mentions obtaining the International Gay Guide for distribution in this country. In the lower half of the letter is a note addressed "Dear RUBE," in which the American rights for the "Gay Guide" are mentioned.

H. A letter dated February 17, 1975, addressed to REUBEN STURMAN, Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio, on stationery with the letterhead of Cinetex BV, Lasse Braun Sex Shop/Cinemas RON BRAVERMAN, Director, with the address, The Lasse Braun Shop,

Reguliersbreestraat 7, Amsterdam, Holland. The letter mentions that the author of the letter who is signed RON has been working on contracts to cover an additional expensive film and the the individual responsible for the contracts is requiring an additional $20,000.

I. A 152 page shipping account ledger on which approximately 100 pages are completely filled out. Contained within these pages are approximately 4,000 entries indicating shipments of items and appropriate invoice numbers to various newsstands, bookstores, book exchanges, literary shops, cigar stores, and other magazine and film outlets throughout the United States, Canada, and other foreign countries. The methods of shipment of these items includes entries which are described as "truck", "UPS," "Greyhound," "Trailways", "mail" and other modes of transportation.

J. The items mentioned in letters "F," "G," and "H" were seized pursuant to the Federal search warrant mentioned in Paragraph 3.

K. An invoice, number 4228, dated February 19, 1975, from Buy-Rite Magazine Sales, 4242 Lankershim Boulevard, North Hollywood, California 91602, to Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio 44103 indicating that a shipment of the following magazines had been shipped from Buy-Rite Magazine Sales to Sovereign News Company on February 18, 1975, via Yellow Freight Systems.

Quantity	Description	Rate	Amount
500	Bachelor Journal 1/3		
500	Bad and Bold, 1/3		
500	Erotic, 1/3		
500	Naked Mrs., 2/2		
500	Diane, 1/10		
500	Hombre, 2-11		

Quantity	Description	Rate	Amount
500	Slick Chick, 1/7		
500	Swingers, 3/5		
500	Wives Alone, 1/12		
Total of 4.500 magazines		.50	$2,250.00

Attached to this invoice was a Yellow Freight System bill of lading indicating that the enclosed 4,500 magazines had been shipped in 46 cartons. This was Yellow Freight System Way Bill 111-182318 and also attached to this was a Sovereign News Company report number 14960 which indicated receipt of the 46 cartons.

7. On March 17, 1975, the affiant was advised by Special Agent RICHARD K. PHINNEY, Los Angeles, California, Division of the Federal Bureau of Investigation that he had developed information regarding a shipment of magazines from Southeast Products, 11233 San Fernando, San Fernando, California, to Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio. Special Agent PHINNEY provided the affiant with a copy of a Yellow Freight System bill of lading number 111-178373 which indicated that 125 cartons of magazines had been shipped from Southeast Products, 11233 San Fernando, San Fernando, California, to Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio. According to Special Agent PHINNEY, contained within the cartons were copies of a magazine entitled, "The Sex Family." Special Agent PHINNEY advised that the magazine bore a $7.50 cover price and

consisted of black and white and color photographs vividly portraying obscene sexual acts to include fellatio, cunnilingus, and ejaculation, and anal intercourse.

8. On March 19, 1975, Special Agent THOMAS W. W. WARD of the Cleveland Division of the Federal Bureau of Investigation advised that affiant during the course of the execution of the Federal search warrant aforementioned, that he had seized three (3) copies of a magazine entited, "The Sex Family." Special Agent WARD advised the affiant that he had retrieved the copies of "The Sex Family" from a carton on which the address label was affixed. Special Agent WARD advised the affiant that he seized this address label which bore the information indicating that the carton had been shipped from Southeast Productions, 11233 San Fernando Road to Sovereign News Company, 2075 East

65th Street, Cleveland, Ohio 44103. The affiant reviewed copy of this magazine subsequent to its seizure by Special Agent THOMAS W. W. WARD and found that contained within are numerous black and white and color photographs vividly portraying obscene sexual activities between males and females to include acts of fellatio, cunnilingus, and ejaculation and anal intercourse.

9. Based upon the information set forth in this affidavit, the affiant has reason to believe and does believe that on the premises known as the Sovereign News Company, located at 2075 East 65th Street, Cleveland, Ohio, there are located therein additional copies of various obscene, lewd, lascivious, and filthy magazines and films. Said obscene, lascivious, lewd and filthy magazines and films having been imported into the United States in violation of Title 18, United States Code, Section 1462. In addition, upon the

premises of the Soverign News Company, 2075 East 65th Street, Cleveland, Ohio, there are located therein additional copies of various obscene, lascivious, lewd and filthy magazines and films which have been and continue to be mailed and delivered via the United States postal Service in violation of Title 18, United States Code, Section 1461. Further, there are located upon the premises known as the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio, additional copies of various obscene, lewd, lascivious, and filthy magazines and films which have been and continue to be transported in interstate commerce in violation of Title 18, United States Code, Section 1465. In addition, the affiant has reason to believe and does believe, that additional records, notations, receipts, bills of lading, billing invoices, and other documents evidence of the above described illegal

importation, mailing, and interstate shipment of obscene, lascivious, lewd, and filthy materials are located at the Sovereign News Company, 2075 East 65th Street, Cleveland, Ohio.

10. Affiant states that 2075 East 65th Street, Cleveland, Ohio, is further described as a two-story brick building located on the east side of East 65th Street adjacent to and immediately north of Carnegie Avenue, Cleveland, Ohio. Above the entrance to East 65th Street, is a white sign with black lettering stating Sovereign News Company.

/s/George E. Grotz
GEORGE E. GROTZ
Special Agent
Federal Bureau of
Investigation

Subject is sworn to me this 25th of March, 1975.

/s/Herbert T. Maher
HERBERT T. MAHER
United States Magistrate

UNITED STATES CONSTITUTION

FIRST AMENDMENT

Freedom of Religion, Speech And Press;
Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION

FOURTH AMENDMENT

Searches and Seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

No. 82-1676

In the Supreme Court of the United States

OCTOBER TERM, 1982

SOVEREIGN NEWS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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SOVEREIGN NEWS COMPANY, PETITIONER

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks the return of FBI-made photocopies of business records seized from its premises during two judicially authorized searches, which it contends violated the First and Fourth Amendments.

1. Pursuant to two search warrants issued by a federal magistrate in the United States District Court for the Northern District of Ohio, FBI agents seized business records and pornographic magazines and films from petitioner's office in March 1975. Shortly thereafter, petitioner filed a motion in the district court, under Fed. R. Crim. P. 41(e), for the return of its property, which petitioner contended had been seized unlawfully (Pet. App. A74-A91). Following an evidentiary hearing, the district court held

that the searches were lawful and it issued an order denying petitioner's motion (C.A. App. 127-195, 197).[1]

On March 26, 1976, while an appeal from that order was pending, petitioner was indicted in the United States District Court for the Northern District of Ohio on charges of violating the federal obscenity laws. In view of the pending prosecution, the court of appeals held that it was without jurisdiction to entertain petitioner's interlocutory appeal. *Sovereign News Co.* v. *United States*, 544 F.2d 909 (6th Cir. 1976), cert. denied, 434 U.S. 817 (1977).

In July 1978, petitioner was acquitted by a jury on the obscenity charges. Following the acquittal, the government returned all films, magazines and business records seized from petitioner during the March 1975 searches. The government, however, retained FBI-made photocopies of petitioner's business records. In August 1978, petitioner moved to reinstate its appeal from the district court's 1975 order denying its motion for return of property. On September 21, 1978, the court of appeals denied the motion "without prejudice to the right of [petitioner] to renew its motion in the district court for the recovery of its property alleged to have been seized unlawfully and unconstitutionally by federal agents, and, in event of the denial of said motion by the district court, to perfect an appeal to this court from such denial" (Pet. App. A40-A41).

Petitioner renewed its motion for return of property in the district court. After a brief hearing, the district court again found that the searches and seizures were lawful, and it denied petitioner's motion (Pet. App. A42-A67). The court of appeals upheld the legality of the searches but remanded the case to the district court for further proceedings (*id.* at A3-A39). After examining each of petitioner's

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[1] "C.A. App." refers to the appendix filed in the court of appeals.

First and Fourth Amendment claims, the court of appeals held that the two 1975 search warrants were valid and that they had been lawfully executed (*id.* at A9-A33). The court ruled, however, that despite the lawful seizure of the business records, petitioner has a right to possession of the photocopies unless the government can show that "the copies are needed for an ongoing or proposed specific investigation" (*id.* at A37). In so ruling, the court rejected the government's claim that FBI-made photocopies of legally seized business records are government property and can be retained by the FBI. Accordingly, the court remanded to the district court for further proceedings pertaining to the government's need for the photocopies (*id.* at A39).

2. Petitioner contends that the two 1975 searches of its business premises violated the First and Fourth Amendments. Whatever the merits of these claims, there is no reason for this Court to rule on any of the questions presented at this time. First, petitioner has not been convicted of a federal crime on the basis of the evidence seized in the 1975 searches and there are currently no federal charges pending against petitioner in which the evidence might be used. Hence, the applicability of the exclusionary rule to the fruits of the searches is not presently at issue. See *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 359 (1977). If, at some future time, the government were to attempt to introduce the fruits of those searches against petitioner in a criminal prosecution, petitioner could contest the lawfulness of the searches by way of a motion to suppress.

Moreover, insofar as petitioner is seeking to vindicate its property rights in the seized materials, every item that was removed from petitioner's premises in 1975 has been returned. Consequently, with respect to the seized business

records and pornographic materials, petitioner's motion for return of property is now moot.[2]

With respect to the government's obligation, if any, to give petitioner the FBI-made photocopies of petitioner's business records, that issue is not yet ripe for review. Both courts below have determined that the originals were legally seized. Although the government argued below that it is entitled to retain its photocopies of petitioner's lawfully seized business records, the government will abide by the decision of the court of appeals in this case and will turn over the photocopies to petitioner if the district court determines that they are not needed by the government for "a specific investigation" (Pet. App. A39). Should petitioner prevail at this hearing, its motion for return of property will be fully satisfied, and its Rule 41(e) motion will be moot in its entirety. If, on the other hand, the district court permits the government to retain the photocopies, petitioner will be free to litigate further the retention question. Accordingly, review by this Court of the questions presented in the petition would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JUNE 1983

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[2]Because the FBI did not make copies of the pornographic materials and all of the originals have been returned to petitioner, the case is clearly moot as to these materials.

[3]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.